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Punitive Damages, Due Process, and Employment Discrimination

Joseph A. Seiner*

*The Supreme Court has failed to provide any substantive guidance on when punitive damages are appropriate in employment discrimination cases since it issued its seminal decision in *Kolstad v. American Dental Ass'n* over twelve years ago. The Court has recently expanded its punitive damages jurisprudence in the high-profile decisions of *Philip Morris USA v. Williams* and *Exxon Shipping Co. v. Baker*. While these cases dramatically altered the way exemplary relief is analyzed in civil cases, the extent to which these decisions apply in the workplace context remains unclear. Surprisingly, there has been almost no academic literature to date explaining how *Philip Morris* and *Exxon* impact punitive damages claims brought by employment discrimination plaintiffs. This Article seeks to fill that substantial void in the scholarship, looking specifically at the potential due process implications.*

*Navigating the recent Supreme Court cases, this Article proposes a uniform analytical framework for analyzing punitive damages in cases brought under Title VII of the Civil Rights Act of 1964. The model proposed in this Article provides a blueprint for courts and litigants when considering whether punitive relief is appropriate in an employment discrimination case. If adopted, the model set forth in this Article would resolve much of the uncertainty that currently exists in the lower courts over how to apply the remedial provisions of Title VII—as interpreted through the confusing *Kolstad* decision—to employment discrimination claims. This Article explains how this proposed framework would bring much more efficiency to the judicial process and help define the future of workplace punitive damages.*

* Associate professor at the University of South Carolina School of Law. The author would like to thank Charles Sullivan, Michael Zimmer, Sandra Sperino, Benjamin Gutman, and Megan Seiner for their extremely helpful thoughts and comments on this paper. The author would also like to thank the participants at the Fifth Annual Colloquium on Current Scholarship in Labor & Employment Law (held at the Washington University School of Law and the Saint Louis University School of Law) for their helpful feedback. This Article is dedicated to Stephen J. Seiner, Alice A. Seiner, John E. Sweeney, Joan D. Sweeney, and grandparents everywhere for all the love and support that they so selflessly provide. Any errors in this Article are entirely my own.

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Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm.

—Former Supreme Court Justice Sandra Day O'Connor¹

I. INTRODUCTION

Punitive damages have often captured the attention of the public, particularly where the awards have provided substantial relief for the victims involved.² Title VII of the Civil Rights Act of 1964 (“Title VII”) was amended in 1991 to include exemplary relief.³ Unfortunately, punitive damages were added to the statute with no clear guidance on when this form of relief is appropriate in workplace discrimination cases.⁴

More than a decade has passed since the Supreme Court provided its clearest statement of how punitive damages should be analyzed under Title VII. In *Kolstad v. American Dental Ass’n*, the Court looked to agency principles to determine when an employer can be subject to exemplary relief.⁵ While *Kolstad* resolved many questions for this area of the law, it also generated significant confusion in the lower courts over the proper standard to apply in workplace cases. Most notably, the decision does little to resolve the question of what “malice or . . . reckless indifference”⁶ means under the statute, and the courts have issued varied and conflicting opinions on this issue.⁷

The confusion in this area of the law has become more pronounced after the Supreme Court’s recent decisions on punitive damages in *Exxon Shipping Co. v. Baker*⁸ and *Philip Morris USA v. Williams*,⁹ which both arose

1. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O’Connor, J., dissenting). See generally *Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1784–85 (2000) (comparing the criticisms of punitive damages); Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 467 (1998) (same).

2. See generally Murphy, *supra* note 1, at 467 (discussing punitive damages); *Developments in the Law: The Paths of Civil Litigation*, *supra* note 1, at 1783–88 (same).

3. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–74 (codified at 42 U.S.C. § 1981a (2006)). This Article uses the terms *punitive damages* and *exemplary damages* interchangeably.

4. See *id.* See generally Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735 (2008) (discussing punitive damages in employment discrimination cases).

5. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999).

6. 42 U.S.C. § 1981a(b)(1).

7. See *infra* Part III (discussing the various approaches of the lower courts when analyzing punitive damages in the employment discrimination context).

8. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

9. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

outside of the employment discrimination context and involved due process questions. In *Philip Morris*, the Court held that the Due Process Clause of the Fourteenth Amendment permits a jury to consider harm incurred by strangers to the litigation for purposes of considering reprehensibility—but not punishment—when awarding punitive relief.¹⁰ More recently, in *Exxon*, the Court held that where federal common law is in place to address punitive damages, due process concerns are not implicated.¹¹ While these cases represent a sea change for how punitive damages should be analyzed, the Supreme Court has not provided any guidance on whether these decisions should impact employment discrimination plaintiffs. Indeed, the Court has not offered any substantive guidance in this area since the *Kolstad* decision was issued, more than a dozen years ago.

Much more surprisingly, there has been almost no discussion in the academic literature of how *Exxon* and *Philip Morris* affect a Title VII plaintiff's right to relief.¹² In fact, there has been little written in recent years on the topic of workplace punitive damages at all.¹³ This Article seeks to fill this void in the scholarship and to provide guidance on when punitive damages are appropriate in the employment discrimination context.

This Article proposes an analytical framework that can be applied to Title VII cases to determine whether a punitive damages claim should proceed.¹⁴ Navigating the *Kolstad* decision, as well as other Supreme Court case law, this Article provides a blueprint for courts and litigants to follow when analyzing whether exemplary relief is appropriate in an employment discrimination case. The analytical framework set forth in this Article makes sense of the recent Supreme Court decisions in *Philip Morris* and *Exxon*.¹⁵ By

10. *Id.*

11. *Exxon*, 554 U.S. 471.

12. Cf. Paul Edgar Harold & Tracy L. Cole, *Darned if You Due Process, Darned if You Don't! Understanding the Due Process Dilemma for Punitive Damages in Title VII Class Actions*, 30 U. ARK. LITTLE ROCK L. REV. 453 (2008) (discussing punitive damages in Title VII class-action cases and addressing the impact of the *Philip Morris* decision).

13. See, for example, the following articles, all of which discuss punitive damages in employment discrimination cases: Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of Kolstad v. American Dental Association*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 477 (2011); Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701 (2010); Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227 (2009); Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws*, 89 KY. L.J. 581 (2001); Judith J. Johnson, *A Uniform Standard for Exemplary Damages in Employment Discrimination Cases*, 33 U. RICH. L. REV. 41 (1999); Judith J. Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521 (1994).

14. See *infra* Part IV (proposing a new analytical framework for analyzing whether punitive relief is appropriate in a Title VII case). See generally Seiner, *supra* note 4 (discussing analysis of punitive damages in employment discrimination cases).

15. See *infra* Parts III–IV (discussing applicability of recent Supreme Court decisions to Title VII claims).

explaining how these cases should apply to Title VII claims, the proposed analytical framework could help avoid years of unnecessary litigation. Through this newly proposed model for analyzing punitive damages in the workplace, this Article seeks to provide clarity and simplicity to a currently confused area of the law. I have previously argued for replacing the punitive damages scheme of Title VII with a more streamlined liquidated-damages approach similar to that used in age discrimination cases.¹⁶ Nonetheless, to the extent punitive damages are still used in this area of the law, a more simplified approach is necessary. This Article offers that approach. At the outset, it is worth noting that this Article focuses exclusively on punitive damages in Title VII cases and does not explore the question of exemplary relief under other civil-rights statutes, such as 42 U.S.C. § 1981.¹⁷ Where this Article discusses employment discrimination or workplace plaintiffs, then, it is specifically referencing those individuals bringing claims pursuant to Title VII.

This Article begins by exploring the Supreme Court decisions in *Kolstad*, *Exxon*, and *Philip Morris*, and explains how these cases impact Title VII employment discrimination plaintiffs seeking punitive relief.¹⁸ This Article further examines the purpose and role of punitive damages in our society, as well as the importance of adding this form of relief to Title VII.¹⁹ Next, this Article explores the confusion in the lower courts over how *Kolstad* should apply to employment discrimination cases, noting that this uncertainty will only grow after the more recent Supreme Court case law on punitive relief.²⁰ Navigating *Kolstad* and the recent case law on punitive damages, this Article proposes a uniform analytical framework for determining when punitive relief is appropriate in an employment discrimination case brought under Title VII.²¹ The Article concludes by addressing the implications of adopting the proposed model and explaining the intricacies and limitations of this new analytical framework.²² This Article suggests that the proposed model would provide significant efficiency to the judicial process through a simple, uniform analysis of punitive relief in Title VII cases.²³

16. See generally Seiner, *supra* note 4 (discussing punitive damages in employment discrimination cases).

17. See *infra* Part V (discussing limitations of the model proposed in this Article).

18. See *infra* Parts II–III (discussing the impact of recent Supreme Court decisions on punitive relief in employment discrimination cases).

19. See *infra* Part III.A (discussing purpose and role of exemplary relief).

20. See *infra* Part III.D (discussing confusion in lower courts over *Kolstad* standard).

21. See *infra* Part IV (setting forth proposed framework).

22. See *infra* Parts V–VI (discussing limitations and implications of proposed framework).

23. See *infra* Part VI (discussing implications of the proposed framework).

II. SUPREME COURT CASE LAW

In recent years, the Supreme Court has provided substantive guidance on the applicability of punitive damages to civil cases.²⁴ Little of this guidance has been in the employment discrimination context, however. The seminal case in this area, *Kolstad v. American Dental Ass'n*, is now over a dozen years old and represents the Court's clearest expression of how to assess punitive damages in the workplace.

In *Kolstad*, the Court considered a case where the plaintiff alleged sex discrimination pursuant to Title VII.²⁵ The plaintiff in that case, Carole Kolstad, asserted that the American Dental Association had failed to promote her because of her gender.²⁶ Kolstad maintained that the selection procedures used in deciding who would receive a promotion were a "sham," and that a male had been chosen for the position before the process had even started.²⁷ The plaintiff also introduced evidence showing that the acting head of the office had used derogatory language when referring to professional women and had told jokes that were sexually inappropriate.²⁸ The district court rejected the plaintiff's request that a punitive damages instruction be given to the jury.²⁹ The jury ultimately awarded backpay of \$52,718 in the case, finding that the American Dental Association had discriminated against Kolstad on the basis of her gender.³⁰

The plaintiff appealed the district court's refusal to give the punitive damages instruction, and the Court of Appeals for the District of Columbia reversed the lower court's decision. The appellate court concluded that a showing of extraordinary egregiousness was not required and that "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable."³¹ Rehearing the case en banc, the D.C. Circuit limited punitive damages in Title VII cases to those instances where the defendant has engaged in some type of "egregious" conduct.³²

The Supreme Court granted certiorari in the case to address the standard for awarding punitive damages under Title VII.³³ The Court noted

24. See *infra* Part II (discussing *Exxon* and *Philip Morris* decisions).

25. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 531 (1999). See generally Seiner, *supra* note 4, at 751-56 (discussing *Kolstad*).

26. *Kolstad*, 527 U.S. at 530-31.

27. *Id.* at 531.

28. *Id.*

29. *Id.* at 532.

30. *Id.*

31. *Id.* at 532-33 (quoting *Kolstad v. Am. Dental Ass'n*, 108 F.3d 1431, 1438 (D.C. Cir. 1997)) (internal quotation marks omitted).

32. *Id.* at 533 (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 965 (D.C. Cir. 1998)) (internal quotation marks omitted).

33. *Id.*

that the structure of the statute “suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination.”³⁴ Thus, the statute is two-tiered: it provides a basis for finding liability and a separate, “higher standard” for awarding punitive relief.³⁵ The Court rejected the appellate court’s view, however, that there must be a certain level of egregiousness for awarding punitive relief, and noted instead that “[t]he terms ‘malice’ and ‘reckless’ ultimately focus on the actor’s state of mind.”³⁶

The Court then proceeded to define what “with malice or with reckless indifference” means in the Title VII context. The Court held that under the statute, “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.”³⁷ The Court explained that there could thus be a subset of cases where an employer intentionally discriminates but is not ultimately liable for exemplary relief. Most notably, the employer might not have knowledge of the federal law that it is violating.³⁸ Or the employer may act intentionally but with the view that its discrimination does not violate the statute or that its conduct falls within an exception.³⁹ In such scenarios, the employer would still be liable under Title VII but would not be subject to punitive relief.

In addition to requiring an employer to possess knowledge that its conduct is in violation of Title VII, the Court further required that the plaintiff impute liability to the defendant through the principles of agency.⁴⁰ Walking through the text of the Restatement (Second) of Torts, the Court noted that liability can be imputed where the employer “authorizes or ratifies the agent’s tortious act”⁴¹ or where the individual perpetrating the discrimination is a manager “acting in the scope of employment.”⁴² Midlevel managers would satisfy the Court’s interpretation of the Restatement, as the individual “must be ‘important,’ but perhaps need not be the employer’s ‘top management, officers, or directors,’ to be acting ‘in a managerial capacity.’”⁴³

34. *Id.* at 534.

35. *Id.*

36. *Id.* at 535. The Court clarified, however, that “egregious or outrageous acts may serve as evidence supporting an inference of the requisite ‘evil motive.’” *Id.* at 538.

37. *Id.* at 536.

38. *Id.* at 536–37.

39. *Id.* at 537.

40. *Id.* at 540–41.

41. *Id.* at 542–43.

42. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 217C (1957)) (internal quotation marks omitted).

43. *Id.* at 543 (quoting 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 4.4(B)(2)(a), at 181 (3d ed. 1995)).

The Court did provide a defense for employers, however, that would exempt them from liability for punitive damages. Where an employer makes “good faith efforts” to comply with the statute, vicarious liability should not be imposed.⁴⁴ The Court provided that “implementing programs or policies to prevent discrimination in the workplace” or other “prophylactic” measures would help satisfy this good-faith defense.⁴⁵ Thus, in its opinion, the Court sought to promote the use of “antidiscrimination policies” and efforts “to educate [a company’s] personnel on Title VII’s prohibitions.”⁴⁶

In conclusion, the Court made clear that egregious conduct is not necessary to secure punitive relief under Title VII. Rather, the plaintiff must produce sufficient evidence “to support an inference that the requisite mental state can be imputed” to the employer.⁴⁷ The Court also carved out a defense that would exempt an employer from punitive damages where the employer establishes that it was acting in good faith. Applying this test, the Court remanded the matter for further consideration on the principles it set forth in the case.⁴⁸

More recently, the Supreme Court has expounded upon its punitive damages jurisprudence, though outside of the workplace context. In *Philip Morris USA v. Williams*, the Court addressed the question of whether a company can be subjected to punitive damages for harm to third parties not part of the litigation.⁴⁹ In *Philip Morris*, an individual’s estate sued a cigarette manufacturer under state law for negligence and deceit related to his death, which was the result of smoking.⁵⁰ Finding for the plaintiff, the jury awarded \$821,000 in compensatory damages and \$79.5 million in exemplary relief.⁵¹

The company objected to the verdict on the grounds that the ratio of compensatory relief to punitive damages was in excess of what the Constitution allows.⁵² Additionally, Philip Morris argued that the trial court had erred in failing to instruct the jury that punitive damages could not be awarded to punish the company for harms on behalf of others not party to the litigation.⁵³ Specifically, the company noted that plaintiff’s counsel had referenced the widespread damage that Philip Morris cigarettes had caused to the general population, and the company maintained that this was an improper consideration for awarding punitive relief.⁵⁴

44. *Id.* at 544.

45. *Id.* at 545.

46. *Id.*

47. *Id.* at 546.

48. *Id.*

49. *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007).

50. *Id.* at 349–50.

51. *Id.* at 350.

52. *Id.* at 351.

53. *Id.* at 350–51.

54. *Id.*

Addressing the question of whether a jury may award punitive damages on the basis of third-party effects, the Court held that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent.”⁵⁵ The Court noted that due process requires that an individual cannot be punished without having the opportunity to present a full defense.⁵⁶ A defendant will be unable to avail itself of an adequate defense where the accusations of injury come from “strangers to the litigation.”⁵⁷ Thus, in this case, the company would be unable to establish that individuals injured from cigarette smoking “knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary,” if those persons were not party to the litigation.⁵⁸ Perhaps more importantly, the Court warned that allowing punishment for nonparty harm would result in “a near standardless dimension to the punitive damages equation.”⁵⁹

Thus, the Court was clear that exemplary relief cannot be used to “punish[] a defendant for harming others.”⁶⁰ The Court did acknowledge, however, that a jury may consider *reprehensibility* when awarding punitive damages and that nonparty harm may factor into that determination.⁶¹ The Court therefore distinguished reprehensibility from punishment when considering third-party harm for purposes of awarding exemplary relief. Interestingly, the *Kolstad* Court downplayed the importance of considering reprehensibility when awarding punitive relief for *workplace* claims, stating that “the reprehensible character of the conduct is not generally considered apart from the requisite state of mind.”⁶²

Having concluded that a jury may consider harm to strangers for purposes of considering reprehensibility—but not punishment—when awarding punitive damages, the Court remanded the case for the lower court to apply this new standard.⁶³ The Court further found it unnecessary to address the question of whether the award itself was “grossly excessive.”⁶⁴

55. *Id.* at 353.

56. *Id.*

57. *Id.*

58. *Id.* at 353–54.

59. *Id.* at 354.

60. *Id.*

61. *Id.* at 355.

62. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 538 (1999).

63. *Philip Morris*, 549 U.S. at 357–58. The Court was also clear that state courts must provide some procedures to make certain that a jury is only considering harm to strangers for purposes of reprehensibility, rather than punishment, where there is a risk of confusion. *Id.* at 357. A state does have flexibility in determining exactly what those procedures should look like. *Id.*

64. *Id.* at 358.

In *Exxon Shipping Co. v. Baker*, the Supreme Court again addressed the appropriateness of an award of punitive relief.⁶⁵ In *Exxon*, the Court examined a case where the crew of an oil tanker ran aground the ship off the coast of Alaska, resulting in a spill of an enormous amount of crude oil into Prince William Sound.⁶⁶ Joseph Hazelwood, who captained the tanker, was a recovering alcoholic.⁶⁷ There was evidence to suggest, however, that Hazelwood had relapsed, and that Exxon management was aware of his difficulties.⁶⁸ Indeed, there was testimony that on the night of the spill the captain consumed approximately five double vodkas prior to departing on the ship.⁶⁹ Hazelwood left the bridge two minutes before a critical turn needed to be made, and those left to man the ship failed to properly navigate the vessel.⁷⁰ The ship crashed into a reef, resulting in an oil spill of eleven million gallons.⁷¹

Exxon stipulated to negligence before the District Court for the District of Alaska, and a trial was held on the issue of recklessness.⁷² After this trial, the jury concluded that the captain and Exxon were reckless and could thus be subject to exemplary damages.⁷³ In the next phase of the trial, the jury awarded compensatory relief.⁷⁴ In the final phase of the trial, the jury awarded \$5 billion in punitive damages against the company.⁷⁵ This award was reduced to \$2.5 billion on appeal.⁷⁶ The Supreme Court granted certiorari to determine whether this award was appropriate under maritime law and the Clean Water Act ("CWA").⁷⁷

The Court considered Exxon's argument that the CWA preempts an award of exemplary relief under maritime common law.⁷⁸ Rejecting the company's position, the Court saw "no clear indication of congressional intent to occupy the entire field of pollution remedies."⁷⁹ The Court thus turned to the amount of the punitive damages award and Exxon's position that the relief "exceed[ed] the bounds justified by the punitive damages

65. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

66. *Id.* at 476–78.

67. *Id.* at 476.

68. *Id.* at 476–77.

69. *Id.* at 477.

70. *Id.* at 477–78.

71. *Id.* at 478.

72. *Id.* at 480.

73. *Id.*

74. *Id.* 481.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 484–89.

79. *Id.* at 89; *see also id.* ("[N]or for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.").

goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm.”⁸⁰ Tracing the history of exemplary relief, the Court noted that the current consensus is that this form of relief is “aimed not at compensation but principally at retribution and deterring harmful conduct.”⁸¹ The Court explained the purpose of these “twin goals,” noting that:

Under the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it. Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure.⁸²

The Court further pointed out that larger punitive damages awards are considered particularly appropriate where it is difficult to detect the wrongdoing and where injury and compensatory awards are likely to be low.⁸³ Examining the literature, the Court noted that there is “an overall restraint” in the courts when awarding punitive relief, with a median ratio of punitive to compensatory damages “less than 1:1.”⁸⁴ The Court further stated that while due process concerns can be implicated with large punitive damages awards, this case was brought under federal maritime law, and thus “precedes and should obviate any application of the constitutional standard.”⁸⁵ Indeed, the Court’s “due process cases . . . have all involved awards subject in the first instance to state law.”⁸⁶ Thus, the Court’s “enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process.”⁸⁷

Considering several studies on punitive damages, and rejecting the approach used by several states, the Court concluded that a 1:1 ratio of punitive to compensatory damages “is a fair upper limit in such maritime cases.”⁸⁸ The Court noted that this upper threshold will still protect the goals of deterrence and punishment necessary for effective exemplary relief, while

80. *Id.* at 490.

81. *Id.* at 492.

82. *Id.* at 493–94 (citation omitted).

83. *Id.* at 494.

84. *Id.* at 497–99.

85. *Id.* at 501–02.

86. *Id.* The Court further explained, “[o]ur review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.” *Id.* at 502.

87. *Id.* at 501–02.

88. *Id.* at 512–13.

preventing “unpredictable and unnecessary” awards in maritime cases.⁸⁹ The Court further found this ratio appropriate in light of the criminal penalties set forth in the CWA.⁹⁰ And though the case was not considered under due process principles, these guidelines further supported the ratio established by the Court.⁹¹ The Court noted that its previous jurisprudence in this regard concluded that “a single-digit maximum is appropriate in all but the most exceptional of cases.”⁹²

Applying these principles to the facts of the case, the Court concluded that the punitive damages in the case should not exceed the compensatory award of \$507.5 million.⁹³ The Court thus vacated the \$2.5 billion punitive award and remanded the case to the appellate court.⁹⁴

III. *KOLSTAD* REFINED: THE CURRENT STATE OF THE LAW FOR WORKPLACE PLAINTIFFS

The recent Supreme Court decisions in *Philip Morris* and *Exxon* provide substantial guidance for awarding exemplary relief in all areas of the law. These cases similarly help refine the decade-plus-old *Kolstad* decision and provide significant direction for plaintiffs seeking relief as a result of workplace discrimination. Much more guidance is needed, however, as the lower courts remain confused over when exemplary relief is appropriate for workplace claims.⁹⁵ This Article helps provide direction to employment discrimination litigants and the courts by proposing a blueprint for awarding relief in Title VII cases. Before considering this proposed model, however, we must first examine the purpose of punitive damages in the workplace and how the recent case law has further defined the role of awarding exemplary relief in this context.

This Part thus provides an overview of the current state of the law for punitive damages in Title VII claims and identifies the basic principles for employment discrimination litigants to take away from the *Kolstad*, *Philip Morris*, and *Exxon* decisions. This Part further illustrates the significant difficulty the lower courts are experiencing as they grapple with the statutory standard and Supreme Court case law on workplace punitive damages.

A. PURPOSE AND ROLE OF WORKPLACE PUNITIVE DAMAGES

In attempting to understand how *Kolstad* and other Supreme Court decisions impact employment discrimination litigants, we must first examine

89. *Id.* at 513.

90. *Id.* at 514.

91. *See id.* at 514–15.

92. *Id.*

93. *Id.* at 515.

94. *Id.*

95. *See infra* Part III.D (outlining the confusion in the courts over awarding punitive relief to employment discrimination claimants).

the purpose and role of punitive relief. Historically, punitive damages have served several purposes under the law.⁹⁶ Perhaps the most obvious and important function of exemplary relief has been to *punish* the wrongdoer.⁹⁷ As *Philip Morris* demonstrates, however, there is debate over the extent to which punitive damages can be used to punish public, rather than private, harms.⁹⁸ Nonetheless, punishment has long served as the key purpose for awarding punitive relief.⁹⁹ In this regard, the defendant's conduct is seen as so reprehensible that society as a whole may need to punish the offender to "diminish the victim's feeling of helplessness" and to "express the community's sense of outrage."¹⁰⁰

Punitive damages also serve to make an example of the offender and deter future conduct of a similar nature.¹⁰¹ Thus, "[t]he linchpin for any economic argument in support of punitive damages is their role in deterring risky behavior."¹⁰² Therefore, deterrence is often seen as a critical function of exemplary relief.¹⁰³ Though punishment and deterrence are often cited as the primary bases for providing exemplary relief, other justifications exist as well. Most notably, providing public punitive awards is seen as a way of

96. See generally Seiner, *supra* note 4, at 742-47 (discussing the history and purpose of exemplary relief); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 249-53 (2009) (same).

97. Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 414-15 (2008) (noting that historically punitive damages "were used as a form of genuine punishment . . . for private, rather than public, wrongs").

98. *Id.*; *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

99. Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1669 (2005) ("The retribution function is what is commonly referred to as punishment and is a core function of punitive damages." (footnote omitted)).

100. *Id.*

101. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 896 (1998) ("[O]ne of the two main purposes of punitive damages is deterrence. . . . [P]unitive damages are intended 'to deter the wrongdoer and others from committing similar wrongs in the future.'" (quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989))); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1124 (1984) ("Whatever justification may be advanced to support the punitive damage concept, however, most commentators today acknowledge that the modern bases undergirding the theory in the United States are punishment and deterrence."); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 364 (2003) ("[D]eterrence is nonetheless a very significant justification for punitive damages, at least in certain types of torts.").

102. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 288 (1998). Professor Viscusi questions the deterrent effect of punitive relief. *Id.* at 288-89.

103. See Sharkey, *supra* note 101, at 363-65 (discussing the role of deterrence in punitive damages awards); Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1580 (1997) ("Punitive damages are intended as both a specific deterrent, so that the offending defendant will not repeat her misconduct, as well as a general deterrent, so that others will be dissuaded from engaging in similar misconduct.").

educating citizens of their legal rights and obligations.¹⁰⁴ In this way, punitive relief makes the public aware of the consequences of engaging in illegal acts and provides notice of the potential penalties involved with such unlawful conduct.¹⁰⁵

Similarly, punitive damages are sometimes seen as a way of adequately compensating a victim.¹⁰⁶ Though prevailing plaintiffs will receive other damages for their injuries, punitive relief helps make them whole by offsetting the costs associated with bringing suit.¹⁰⁷ Finally, it has been noted that punitive relief serves a law enforcement function as well.¹⁰⁸ Thus, these damages “serve as a kind of bounty, inducing injured victims to serve as ‘private attorneys general,’ increasing the number of wrongdoers who are pursued, prosecuted and eventually ‘brought to justice.’”¹⁰⁹

Though punitive damages generally can be seen as filling one or several of these functions—punishment, deterrence, education, compensation, and law enforcement¹¹⁰—the role of this form of relief in the employment discrimination context is not as clearly defined.¹¹¹ Title VII provides the basis for plaintiffs to recover exemplary relief, stating that “[a] complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the [defendant] engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”¹¹²

104. See Gash, *supra* note 99, at 1671–72 (discussing the role of education in punitive damages awards).

105. See David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374–75 (1994) (“Punitive damages serve a strong educative function for both the individual offender and society in general . . .”).

106. See *id.* at 378–79 (“Although it is frequently said that the purpose of punitive damages is to punish the defendant and to deter misbehavior—not to compensate the plaintiff—punitive damages do indeed serve a variety of important compensatory roles.”).

107. Gash, *supra* note 99, at 1673–75 (discussing the view “that punitive damages . . . serve a compensatory function”).

108. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1451 (1993) (“A crucial function of punitive damages is to provide financial incentives for private parties to enforce the law—the bounty system.”); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 43 n.32 (1983) (“[P]unitive damages encourage plaintiffs to press their claims and enforce the law by providing an incentive for bringing wrongdoers to justice.”).

109. Owen, *supra* note 105, at 381 (quoting David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1287–88 (1976)).

110. See generally Owen, *supra* note 105, at 373–81 (discussing purposes of punitive damages).

111. See generally Seiner, *supra* note 4, at 747–51, 775–76 (discussing role of exemplary relief in workplace discrimination cases and offering new model for considering damages).

112. 42 U.S.C. § 1981a(b)(1) (2006).

The statute also limits the amount of punitive damages that can be imposed on a defendant, which varies depending upon the size of the particular employer.¹¹³ The smallest defendants under the statute may be subjected to a combined \$50,000 in punitive and compensatory damages.¹¹⁴ The largest employers may incur a total of \$300,000 in punitive and compensatory relief.¹¹⁵ Nothing in the statutory text of Title VII, however, addresses the purpose for providing this form of relief in the employment discrimination context.¹¹⁶

Nonetheless, the legislative history of the Civil Rights Act of 1991, which amended Title VII to allow for punitive relief,¹¹⁷ provides some guidance. A report from the House of Representatives revealed that one of the primary purposes of this amendment to the remedial provisions of the statute was “to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.”¹¹⁸ Thus, deterrence and compensation seemed to be the motivating rationales behind the legislature’s addition of exemplary relief to Title VII.¹¹⁹

Supreme Court case law has recently refocused the purpose of exemplary relief in civil cases. The Court has provided that “[r]egardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”¹²⁰

Thus, despite the various underlying principles provided for exemplary damages during the long history of this form of relief, the Court now clearly views deterrence and retribution as the principle purposes of punitive damages. These “twin goals” of punitive relief aim to prevent and punish

113. *Id.* § 1981a(b)(3).

114. *Id.* § 1981a(b)(3)(A).

115. *Id.* § 1981a(b)(3)(D). *See generally* Seiner, *supra* note 4, at 781–83 (discussing statutory caps).

116. 42 U.S.C. § 1981a.

117. Johnson, *A Standard for Punitive Damages Under Title VII*, *supra* note 13, at 527–28 (“The Civil Rights Act of 1991 . . . changed the remedial provisions of Title VII, allowing plaintiffs who proved intentional discrimination to recover compensatory and punitive damages.”); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 216 n.94 (2009) (“The Civil Rights Act of 1991 instituted both compensatory and punitive damages, and the concomitant right to backpay.”). *See generally* Seiner, *supra* note 4, at 749–51 (discussing legislative history and statutory revision of Title VII).

118. H.R. REP. NO. 102-40, pt. 2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694. *See generally* Seiner, *supra* note 4, at 750 (“In considering the legislation, Congress was thus clear that, based on the testimony before it, the addition of new remedial relief to Title VII was a critical component of deterring future wrongful conduct and encouraging ‘private enforcement’ of the statute.” (quoting H.R. REP. NO. 102-40, pt. 1, at 70)).

119. H.R. REP. NO. 102-40, pt. 2, at 1. *See generally* Seiner, *supra* note 4, at 749–50 (discussing role of punitive damages in Title VII).

120. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

intentional, malicious, or reckless conduct of an unlawful nature.¹²¹ Though not identical to the purposes Congress expressed for adding punitive relief to Title VII, punishment and deterrence can certainly be seen as playing a role in civil rights litigation more broadly.¹²² And Congress likely saw deterring unlawful discriminatory conduct as one of the primary benefits of providing exemplary relief for workplace claims.¹²³

B. KOLSTAD REVISITED

Though *Kolstad* fails to offer any substantial guidance on the *purpose* underlying exemplary relief, the decision does provide an important backdrop for punitive damages in Title VII cases. Though problematic in many respects, the decision remains the best statement of when exemplary relief can be awarded to employment discrimination plaintiffs. Thus, *Kolstad* is the best—and really only—Supreme Court decision explaining the parameters of punitive relief in the Title VII context. Despite the confusion that *Kolstad* creates,¹²⁴ it does offer a few clear-cut principles for employment discrimination litigants. It is helpful to briefly highlight these principles before moving on to the more difficult aspects of the decision.

Initially and importantly, the decision resolves the difficult question of how liability can be imputed to an employer. In many ways it is counterintuitive to punish a corporation or other “employer” for unlawful conduct when it is an individual—not the company—who has taken the inappropriate action. This inquiry becomes even more difficult when the individual taking the unlawful action is doing so against the express policies of the employer. *Kolstad* makes clear that, as in other areas of the law, we must rely on agency principles when considering whether to impute liability to the employer.¹²⁵ Thus, according to the Court, liability can be imputed where a supervisor “authorizes or ratifies the agent’s tortious act,”¹²⁶ or

121. *Id.* at 492–94.

122. See generally Cynthia L. Alexander, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595, 617–18 (1991) (noting that one court “analyzed the legislative history of Title VII and concluded that the congressional objective in enacting Title VII was not to punish employers with huge damage awards”); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 751 (1987) (“Title VII is a statute concerned not only with punishing individuals who intentionally engage in discriminatory acts . . . but also with the broad sweep of societal employment practices which produce decisions based on impermissible criteria.”).

123. H.R. REP. NO. 102-40, pt. 2, at 1; see also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) (“Congress has armed Title VII plaintiffs with remedies designed to punish employers who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers.”).

124. See *infra* Part III.D (outlining the confusion in the courts over awarding punitive relief to employment discrimination claimants).

125. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 540–41 (1999).

126. *Id.* at 543.

where the individual perpetrating the discrimination is a manager “acting in the scope of employment.”¹²⁷ After *Kolstad*, then, a key question in a typical employment discrimination case is whether the manager acting in an unlawful manner is also acting within the scope of employment.¹²⁸

Additionally, *Kolstad* resolves the question of whether there is a certain amount of egregiousness that a plaintiff must show in order to be entitled to exemplary relief. The Supreme Court made clear that plaintiffs were not required to demonstrate a particular amount of egregiousness on the part of the defendant to be entitled to punitive relief.¹²⁹ Instead, the Court determined that the proper inquiry was whether the defendant “discriminate[d] in the face of a perceived risk that its actions will violate federal law.”¹³⁰ The Court explained that an employer can establish this by showing that the supervisor in question was acting with knowledge that she was violating federal law.¹³¹ More precisely, “the reprehensible character of the conduct is not generally considered apart from the requisite state of mind.”¹³²

Finally, the decision is important because it creates a number of incentives for employers to be proactive in identifying and preventing discrimination in the workplace. In this way, *Kolstad* creates an affirmative defense for employers that act in good faith and attempt to comply with the statute.¹³³ An employer that sufficiently demonstrates its good-faith efforts at compliance will immunize itself from any potential liability for punitive damages.¹³⁴ To do so, employers generally will have to establish that they have conducted training or implemented policies or programs targeted at avoiding employment discrimination.¹³⁵

The lessons from *Kolstad* are thus relatively simple. To be entitled to punitive relief, a plaintiff must first establish that the individual perpetrating the unlawful conduct is a manager acting within the scope of employment—thus imputing liability to the employer.¹³⁶ Next, the plaintiff must demonstrate that the defendant knew that its actions were in violation of federal law (or acted recklessly in this regard).¹³⁷ Finally, the defendant may

127. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 217C (1957)) (internal quotation marks omitted).

128. *Id.*

129. *Id.* at 535.

130. *Id.* at 536.

131. *Id.* at 536–37.

132. *Id.* at 538.

133. *Id.* at 544–45.

134. *Id.*

135. *Id.*

136. *Id.* at 542–43 (discussing RESTATEMENT (SECOND) OF AGENCY § 217C (1957)).

137. *Id.* at 533–38.

avoid liability for punitive damages by affirmatively demonstrating that it acted in good faith.¹³⁸

Though these basic principles certainly provide a significant amount of guidance in addressing whether an employment discrimination plaintiff is entitled to punitive relief, the decision still leaves questions. As already noted, the relief provisions of Title VII require a plaintiff to establish that the employer acted “with malice or with reckless indifference.”¹³⁹ Perhaps most problematically, then, *Kolstad* fails to address the difficult question of how we specifically define what *with malice or with reckless indifference* really means. Though the principles outlined in *Kolstad* start us down the path of defining these critical terms, the parameters of this showing still remain largely undefined. This leaves the lower courts without any real guidance on how to apply the clear terms of the statute. Recent Supreme Court decisions, however, do provide some additional instruction for workplace litigants seeking punitive relief.

C. EXXON AND PHILIP MORRIS IN THE WORKPLACE CONTEXT

The Supreme Court’s recent decisions in *Exxon* and *Philip Morris* arose well outside of the workplace arena. Nonetheless, these decisions have critical implications for punitive damages in the employment discrimination context, and offer important lessons not found in the *Kolstad* decision.

Most notably, the Supreme Court’s decision in *Exxon* provides important guidance on the relevance of constitutional concerns when awarding punitive damages pursuant to Title VII.¹⁴⁰ In this regard, the Supreme Court has previously made clear—outside of the Title VII context—that punitive damages must generally comport with the due process considerations of the Constitution.¹⁴¹ In *BMW of North America, Inc. v. Gore*, the Court held that a “grossly excessive” punitive damages award can be so arbitrary as to run afoul of the Due Process Clause of the Fourteenth Amendment.¹⁴² In reaching this conclusion, the Supreme Court provided three guideposts for the courts to consider when evaluating the constitutional fairness of an award of punitive relief—the degree of reprehensibility, the disparity between the harm suffered by the plaintiff and the award of exemplary damages, and the difference between the punitive award and awards permitted in similar cases.¹⁴³

138. *Id.* at 544.

139. 42 U.S.C. § 1981a(b)(1) (2006).

140. As the implications of the *Exxon* decision are a bit broader than the *Philip Morris* case for workplace plaintiffs, this Article first explores the impact of the *Exxon* decision (despite the fact that *Philip Morris* is first in time).

141. See generally Markel, *supra* note 96, at 327–34 (discussing constitutional issues in the context of punitive damages).

142. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

143. *Id.* at 574–75.

In addressing these guideposts, the Court placed significant emphasis on the ratio of the punitive damages awarded to the actual harm (or compensatory damages) suffered by the plaintiff in the case,¹⁴⁴ rejecting a “breathhtaking” award of exemplary relief that was 500 times the harm actually incurred by the plaintiff.¹⁴⁵ In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Supreme Court provided additional guidance on the “guidepost” analysis and further refined the ratio inquiry set forth in *Gore*.¹⁴⁶ In this regard, the Court rejected a ratio of punitive damages to actual harm that was 145 to 1 and stated that it “should be obvious” that “[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with [much higher] ratios.”¹⁴⁷

The extent to which *Gore* and *State Farm*—which addressed the excessiveness of punitive damages under state law—would apply to federal claims remained an open question. What is noteworthy about the *Exxon* decision is that the case helps resolve this issue and carves out a critical exception for these constitutional questions where federal common law is involved. In *Exxon*, the Court considered the appropriateness of punitive damages awarded under maritime law and the Clean Water Act.¹⁴⁸ Acknowledging its prior precedent addressing the due process issues raised by exemplary awards, the Court dismissed those concerns in the case because the matter did not involve a state issue.¹⁴⁹ Rather, the case was brought under *federal* maritime law, “which precedes and should obviate any application of the constitutional standard.”¹⁵⁰

There can be little doubt after *Exxon*, then, that the courts need not reach the due process issues raised in *Gore* and *State Farm* when addressing employment discrimination claims brought under Title VII. The *Exxon* Court specifically acknowledged that where federal maritime law is in place to address punitive relief, due process concerns are not implicated.¹⁵¹ Thus, after *Exxon*, employment discrimination plaintiffs should no longer need to

144. *Id.* at 580–83.

145. *Id.* at 582–83.

146. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

147. *Id.* at 425.

148. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

149. *Id.* at 501–02.

150. *Id.* at 502. Even before *Exxon*, these guideposts should not have been the focus of cases analyzed under federal common law. See generally *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465–66 (1993) (discussing the Due Process Clause and punitive damages); *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649–50 (1977) (discussing the role of federal courts in reviewing jury awards); *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625 (7th Cir. 2000) (discussing the role of the Constitution in federal cases). At a minimum, however, *Exxon* helps clarify that the courts need not reach the due process issues raised in *Gore* and *State Farm* when addressing employment discrimination claims brought under Title VII.

151. *Exxon*, 554 U.S. at 501–02.

address the “guideposts” set forth in *Gore*. The Court’s holding under federal maritime law is entirely consistent with Title VII case law, and it is likely that the Court would extend its reasoning to punitive damages awarded in the workplace. Indeed, two decades of decisions have helped develop a large body of case law establishing the parameters of these awards. Just like the CWA and federal maritime law, then, Title VII case law has created a federal scheme that satisfies any constitutional concerns over the excessiveness of punitive awards.¹⁵²

Beyond the case law, however, it is clear that Title VII satisfies any due process concerns as it specifically sets forth the limits of punitive relief, limiting exemplary awards based on the size of the business.¹⁵³ As already noted, depending upon the size of the employer, a plaintiff can attain a combined total ranging from up to \$50,000 to \$300,000 in punitive and compensatory damages.¹⁵⁴ Employers are on notice, then, that if they intentionally discriminate against employees on the basis of race, color, sex, national origin, or religion, they can be subjected to the punitive penalties set forth in the statute.¹⁵⁵ And as the amendments to Title VII have been in place for two decades, there can be little doubt that employers have received more than sufficient notice of the employment laws and potential damages that flow from violating these laws, thus obviating any due process issues.¹⁵⁶

152. This is not to say, however, that the case law addressing Title VII punitive relief is not without its problems. Indeed, as demonstrated in greater detail below, there is significant confusion over the proper standard to apply in these cases. *See infra* Part III.D (discussing confusion in lower courts). Nonetheless, the large body of case law in this area, combined with the statutory caps on exemplary relief, provide a significant amount of notice to employers of the punitive damages they can be subjected to if they run afoul of the statute.

153. 42 U.S.C. § 1981a(b)(3) (2006); *see also* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) (“[A] reviewing court engaged in determining whether an award of punitive damages is excessive should ‘accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.’” (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring in part and dissenting in part))); *Perez*, 223 F.3d at 625 (“[W]hen a plaintiff seeks punitive damages in a federal case, it is unnecessary to look for limits in the Constitution.”).

154. 42 U.S.C. § 1981a(b)(3)(A)–(D). Another federal civil rights statute, 42 U.S.C. § 1981, contains no statutory cap for punitive damages. *See infra* Part V (discussing limitations of the model proposed in this Article). While beyond the scope of this Article, an important issue remaining after *Exxon* is the extent to which that decision would apply to claims brought under 42 U.S.C. § 1981. *See infra* Part V (same).

155. *See, e.g., Abner v. Kan. City S. R.R. Co.*, 513 F.3d 154, 164 (5th Cir. 2008) (“[T]he combination of the statutory cap and high threshold of culpability for any [Title VII] award confines the amount of the award to a level tolerated by due process.”); *Romano v. U-Haul Int’l*, 233 F.3d 655, 673 (1st Cir. 2000) (discussing reasonableness of punitive damages awards that fall within the Title VII statutory limits).

156. *See* 42 U.S.C. § 1981a; *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999) (“The reasonableness of the punitive award is buttressed by the fact that the [employment discrimination] statute [the defendant] was found to have violated caps punitive awards The award in this case falls within the range that Congress has determined to be reasonable” (citation omitted)).

Thus, where a “congressionally-mandated, statutory scheme” sets forth the clear financial implications for intentionally violating federal law, any award within the confines of that scheme “provides strong evidence that a defendant’s due process rights have not been violated.”¹⁵⁷

Additionally, given even the upper limits of the potential punitive awards—which have remained static since the amendments went into effect—there is no need for employers to be concerned with the multimillion-dollar verdicts that have arisen in other contexts, excluding those workplace cases arising as part of class-action litigation. The federal case law of Title VII, then, combined with the punitive damages limits of the statute, work together to assure that “a penalty [is] reasonably predictable in its severity,” and is not “eccentrically high.”¹⁵⁸ Certainly, Title VII punitive awards must still be reviewed by the federal courts, but it is now clear that due process concerns should no longer be the focus of the courts’ analyses.¹⁵⁹

Similarly, the inquiry into the ratio between actual harm to punitive damages—which formed part of the Supreme Court’s due process analysis in *Gore*—now seems largely irrelevant to workplace claims for due process purposes.¹⁶⁰ However, the degree of actual harm may still prove important as

157. *Romano*, 233 F.3d at 673. This is not to say that *any* federal statute would necessarily pass constitutional muster, and one could certainly hypothesize a federal law that would encounter due process problems. However, given that the Title VII punitive limits are reasonable and have remained unchanged over the last twenty years, it seems likely that the statute complies with the constitutional requirements.

158. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008); see also *Abner*, 513 F.3d at 164 (“Given that Congress has effectively set the tolerable proportion [for Title VII claims], the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process. It does not and, as we have found in punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant.”).

159. See generally *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625 (7th Cir. 2000) (“Federal judges may, and should, insist that the award be sensible and justified by a sound theory of deterrence. Random and freakish punitive awards have no place in federal court, and intellectual discipline should be maintained. If the award is well justified, then it is also constitutionally sound . . .” (citation omitted)).

160. See, e.g., *Abner*, 513 F.3d 154 at 164 (discussing relevance of *Gore* factors to Title VII cases). Nonetheless, it could be argued after *Exxon* that the ratio of punitive to actual damages is still a critical inquiry. Indeed, in *Exxon* the Court concluded that a 1:1 ratio of punitive to compensatory damages “is a fair upper limit in such maritime cases.” 554 U.S. at 513. In employment discrimination cases, however, Congress has clearly set a reasonable upper limit of punitive damages that can be imposed on the largest employers. See 42 U.S.C. § 1981a(b)(3)(D). The statute is thus clear that Congress intended for employers that run afoul of the provisions to potentially be subjected to these upper punitive limits—irrespective of the ratio to actual harm. *Id.* Though, as already noted, any award of punitive relief can be reviewed by the federal courts for excessiveness, and the actual harm involved in a case is certainly one place the court should look as part of this determination. Cf. *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 447 (7th Cir. 2010) (“[A]ppellant asks us to extend [*Exxon*] to mandate a one-to-one ratio between compensatory and punitive damages in this case. The logic of [*Exxon*] does not apply to this Title VII case.”).

part of the consideration of the overall appropriateness of a punitive award, although this determination will likely take place outside of the due process context.¹⁶¹

In addition to the critical importance of *Exxon* to employment discrimination plaintiffs, the Supreme Court's decision in *Philip Morris* has significant implications for workplace litigants. In particular, *Philip Morris* provides important guidance to Title VII plaintiffs on the importance of harm an employer might cause to third parties when it intentionally discriminates against an individual on the basis of a protected characteristic.¹⁶² Though a somewhat complex case, the holding of *Philip Morris* is straightforward: a jury may consider harm incurred by strangers to the litigation for purposes of considering reprehensibility—but not punishment—when awarding punitive damages.¹⁶³

To the extent the case is applicable to a *federal* statute (an issue discussed in more detail below), the decision clarifies that employment discrimination plaintiffs may not argue for enhanced exemplary relief to *punish* an employer for similar harms it caused other individuals in the workplace. Thus, for example, where an employer discriminates against three workers on the basis of race and only one employee files a claim, punitive damages cannot be used to punish the employer on behalf of those who did not bring an action. Just like the defendant in *Philip Morris*, an employer in this situation will be unable to properly defend itself where the accusations of injury come from “strangers to the litigation.”¹⁶⁴

Nonetheless, the employer's conduct toward nonparties to the litigation may still be addressed when the jury considers the reprehensible nature of the conduct when awarding punitive relief.¹⁶⁵ In *Philip Morris*, the Court did acknowledge that a jury may consider *reprehensibility* when awarding punitive damages and that nonparty harm may factor into that determination.¹⁶⁶

161. Some federal courts have even approved “infinite” ratios of punitive damages to actual harm in the employment discrimination context. See *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357 (2d Cir. 2001) (“An award of actual or nominal damages is not a prerequisite for an award of punitive damages in Title VII cases.”); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (“No reason comes to mind for reading a compensatory-punitive link into § 1981a or Title VII . . .”). But see *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1215 (1st Cir. 1995) (“[T]he punitive damages award must be vacated absent either a compensatory damages award, or a timely request for nominal damages, on the federal claims.”). See generally *Abner*, 513 F.3d at 159–60 (discussing various appellate court approaches to issue of whether actual damages are necessary for an award of exemplary relief in a Title VII case); *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228, 237–38 (1st Cir. 2006) (same); *Levi*, *supra* note 13 (same).

162. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

163. *Id.* at 354–55. See generally *Markel*, *supra* note 96, at 327–34 (discussing constitutional issues in the context of punitive damages).

164. *Phillip Morris*, 549 U.S. at 353–54.

165. *Id.* at 354–55.

166. *Id.*

Thus, to the extent that an employer's conduct harms several individuals in the workplace, a jury may award greater punitive relief to a single individual bringing a claim if it finds the conduct particularly reprehensible.¹⁶⁷ This distinction—that a plaintiff may be awarded punitive relief for harm caused to nonparties on the basis of reprehensibility, but not punishment—may prove critical at the conclusion of Title VII litigation.¹⁶⁸

Indeed, the issue of third-party harm will have broad implications in the employment discrimination context. An employer that discriminates against one individual may often discriminate against others as well.¹⁶⁹ And victims of employment discrimination are particularly hesitant to bring claims for fear of retaliation, disruption of the workplace environment, or concern over the perception of their coworkers.¹⁷⁰ Thus, it would not be unusual for an employer that maintains a workplace permeated with discrimination to be sued by only one or two individuals.¹⁷¹ After *Philip Morris*, a strong argument can be made that these individuals will be unable to use the discriminatory experiences of their coworkers to further punish the employer.¹⁷² These individuals would be left to couch the experiences of their coworkers in terms of the reprehensible nature of the employer's conduct.¹⁷³

Of course, a strong argument can be made that *Philip Morris* is inapplicable to employment discrimination cases and that the decision is easily distinguishable from traditional workplace claims. The case arose as a question of state law, and the Court addressed whether the Due Process Clause of the Constitution prohibits a state from punishing a defendant for

167. *Id.*

168. It should be noted that in *Kolstad*, the Court downplayed the importance of considering reprehensibility when awarding punitive relief for workplace claims, stating that “the reprehensible character of the conduct is not generally considered apart from the requisite state of mind.” *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 538 (1999). Thus, the reprehensibility question in employment discrimination cases will often be considered as part of the mental state of the employer. *Id.*

169. See generally Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 200–03 (2010) (discussing studies on employment discrimination that show its continued prevalence).

170. See Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 587–88 (“Prospective Title VII plaintiffs worry about retaliation, particularly if they are still employed by the defendant, and worry about being labeled ‘troublemakers.’”); Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1478 (2007) (“That a reluctance to report Title VII violations persists is a serious problem because Title VII’s ability to realize its potential depends, more so than with much other federal legislation, on the willingness of victims of workplace discrimination to bring that discrimination to light.”).

171. See generally Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 COLUM. HUM. RTS. L. REV. 1, 54 (1987) (arguing that in the employment discrimination class action context, courts “should take into account that fear of retaliation will prevent the vast majority of employees from joining a suit”).

172. *Phillip Morris*, 549 U.S. at 354–55.

173. *Id.*

nonparty harm.¹⁷⁴ The Court's holding is thus premised on the notion that due process requires that an individual cannot be punished without having the opportunity to present a full defense—which it is unable to do where it is being accused of harm by nonlitigants.¹⁷⁵ Just like *Exxon*, then, *Philip Morris* addresses the due process concerns of a punitive damages award issued under state law.¹⁷⁶ A defendant facing an employment discrimination claim under Title VII, however, may not have these same due process arguments. Indeed, as discussed above, Title VII defendants have full knowledge of the amount of punitive relief they can be subjected to under the federal statute and case law.¹⁷⁷ And these amounts are relatively low, and do not reflect the type of “runaway” jury awards that the Court may have been attempting to address in its recent cases.¹⁷⁸ It may well be, then, that the primary holding of *Philip Morris* is inapplicable to Title VII claims, and future litigation may help resolve this issue. Nonetheless, even if the holding itself does not apply in the workplace context, the federal courts are still free to use the tenor of the decision when reviewing punitive damages awards. Certainly, in determining whether a jury's award of exemplary relief is excessive, the federal courts could consider whether punishing an employer for harm to third parties is fair and equitable under the particular circumstances of the case. At a minimum, then, *Philip Morris* provides substantial guidance to the litigants and courts on the potential impact of nonparty harm in the employment discrimination context. Future litigation may well provide the exact contours for how that guidance will be applied to workplace plaintiffs.

D. CONFUSION IN THE COURTS

Not surprisingly, the lack of clear guidance on the applicable standard for awarding punitive damages in the employment discrimination context has resulted in conflicting and confused decisions in the lower courts. The extent to which the recent Supreme Court holdings apply in the employment discrimination context is still unclear.¹⁷⁹ The Title VII statutory standard for punitive relief provides that an employer must take an unlawful action “with malice or with reckless indifference,”¹⁸⁰ but this standard can—and has been—interpreted by the courts in a variety of ways. Though *Kolstad*

174. *Id.* at 353.

175. *Id.*

176. Compare *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), with *Philip Morris*, 549 U.S. 346.

177. See 42 U.S.C. § 1981a (2006) (setting forth potential punitive damages awards in Title VII cases).

178. See *Exxon*, 554 U.S. 471; *Philip Morris*, 549 U.S. 346. Of course, successful class action employment discrimination litigation may result in substantial punitive awards.

179. See *Exxon*, 554 U.S. 471; *Philip Morris*, 549 U.S. 346.

180. 42 U.S.C. § 1981a(b)(1).

provided some direction for employment discrimination litigants, the decision failed to offer clear guidance on how the malice or reckless indifference standard should be applied.¹⁸¹ The confusion over this standard, as well as how to analyze workplace punitive damages claims more generally, has resulted in varied opinions in the federal courts.

EEOC v. Siouxland Oral Maxillofacial Surgery Associates provides an excellent recent example of the lower courts' confusion on the question of exemplary relief.¹⁸² In that case, the Eighth Circuit Court of Appeals considered whether the district court had improperly failed to instruct the jury on punitive damages in a pregnancy discrimination case that was brought pursuant to Title VII.¹⁸³ A receptionist in the case worked for a medical clinic and informed the partnership shortly after being hired that she was pregnant and would eventually need about six to eight weeks of leave as a result.¹⁸⁴ After the managing partner found out about the pregnancy, he stated in a meeting that "[i]t doesn't make any sense to begin training her [W]e are going to have to let her go."¹⁸⁵ She was terminated shortly thereafter and was told that "your baby is going to be due during our busy season" and that the partnership would not have hired her "if [it] had known she was pregnant."¹⁸⁶ A supervisor subsequently told another candidate for the vacant position it was "a problem" that she was four months pregnant and that she should "just continue her pregnancy, have the baby, have her maternity leave," and then the partnership would consider her.¹⁸⁷ This same supervisor wrote on the top of the applicant's resume that she was "4 months pregnant!"¹⁸⁸

The EEOC subsequently filed suit, alleging that the partnership had terminated the receptionist and failed to hire the subsequent applicant on the basis of pregnancy—a clear violation of Title VII.¹⁸⁹ The district court allowed the case to go to the jury, but granted the defendant judgment as a matter of law on the issue of whether punitive damages were available in the matter.¹⁹⁰ The district court determined that "it has not been shown that there was a perceived risk that the actions [of the defendant] would violate federal law to be liable on punitive damages."¹⁹¹ Following a trial, the jury

181. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). See generally *Seiner*, *supra* note 4, at 780 (discussing "malice or reckless indifference").

182. *EEOC v. Siouxland Oral Maxillofacial Surgery Assocs.*, 578 F.3d 921 (8th Cir. 2009).

183. *Id.* at 923.

184. *Id.*

185. *Id.* (internal quotation marks omitted).

186. *Id.* (internal quotation marks omitted).

187. *Id.* at 924 (internal quotation marks omitted).

188. *Id.* (internal quotation marks omitted).

189. *Id.*

190. *Id.*

191. *Id.* at 925 (internal quotation marks omitted).

concluded that the partnership had discriminated on the basis of pregnancy and awarded \$15,341 in backpay to the receptionist and \$5,757 in backpay to the subsequent applicant for the position.¹⁹² The EEOC appealed on the punitive damages question.¹⁹³

In considering the issue, the Eighth Circuit summarized the guidance provided by *Kolstad* on the question of exemplary relief for Title VII claims.¹⁹⁴ The court concluded that the managing partner that had fired the receptionist had been warned that he should not do so on the basis of her pregnancy.¹⁹⁵ Similarly, the supervisor that rejected the subsequent applicant for the position had testified that she was aware that pregnancy discrimination was unlawful.¹⁹⁶ Given that both decisions were made by individuals with supervisory authority and that both individuals were aware that their conduct was illegal, the court concluded that a punitive damages instruction should have been given to the jury.¹⁹⁷ The court thus determined that the conduct of those involved could properly be imputed to the partnership itself and that the district court erred in failing to give the punitive damages instruction.¹⁹⁸ The court therefore remanded for a new trial solely on the question of exemplary relief.¹⁹⁹

This decision provides an excellent illustration of the existing confusion over when punitive damages are appropriate under Title VII. The district court in this case refused to give the question to the jury because it believed that there was insufficient evidence to demonstrate that the employer's conduct was performed under "a perceived risk" of "violat[ing] federal law."²⁰⁰ The Eighth Circuit properly recognized, however, that there was sufficient evidence that those involved in the unlawful conduct had supervisory or managerial authority and that they were aware that their conduct might violate pregnancy discrimination law.²⁰¹ Though the appellate court likely got it right in the end, it is disturbing that the federal courts can so plainly disagree on the appropriate standard for sending a punitive damages question to the jury and that the courts can view the same evidence so differently. The unfortunate result in this case is that the question of exemplary relief must be remanded for a new trial, resulting in substantial inefficiencies for both the courts and litigants.

192. *Id.* at 924.

193. *Id.* at 925.

194. *Id.*

195. *Id.* at 925-26.

196. *Id.* at 926.

197. *Id.* at 925-27.

198. *Id.*

199. *Id.* at 927.

200. *Id.* at 925.

201. *Id.* at 925-27.

Unfortunately, this case is not isolated in its confusion over this issue, and the lower courts routinely grapple with the proper standard to apply to workplace punitive damages claims.²⁰² It is not uncommon for the appellate courts to reverse the district courts on the question of exemplary relief, particularly in employment discrimination cases. For example, in *EEOC v. Heartway Corp.*, the Tenth Circuit Court of Appeals reversed a district court's decision not to give a punitive damages instruction in a disability case and remanded for a new trial on that issue.²⁰³ In that case, a nursing-home employee with hepatitis was terminated by the facility administrator after he found out about her condition, despite the fact that the administrator was aware "that it was against the law to fire someone because they had a disability."²⁰⁴ Finding that the administrator's unlawful conduct and knowledge of the law could be imputed to the company, the appellate court reversed for a new trial on punitive damages.²⁰⁵ Similarly, in *EEOC v. Stocks, Inc.*, the U.S. Court of Appeals for the Fifth Circuit found that the district court had erred in failing to give a punitive damages instruction to the jury in an employment discrimination case.²⁰⁶ Again, there was evidence in that case that showed that the unlawful acts "were taken by management-level employees acting within the scope of their employment" and that the "decisionmakers were aware of their responsibilities under title VII."²⁰⁷

As a final example, in *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, the Eighth Circuit reached a completely different result from those decisions discussed previously, *vacating* a district court's award of exemplary relief in an employment discrimination case.²⁰⁸ In *Canny*, a jury awarded \$100,000 in punitive damages to a beverage company's former route supervisor who was terminated after he was diagnosed with a degenerative eye condition and could no longer maintain a driver's license.²⁰⁹ The appellate court was persuaded that the employer did not reassign the plaintiff to an available warehouse position because of genuine safety

202. See generally Seiner, *supra* note 4, at 767–72 (discussing application of punitive damages standard to workplace cases by federal courts).

203. *EEOC v. Heartway Corp.*, 466 F.3d 1156, 1171 (10th Cir. 2006). The damages provision of the Americans with Disabilities Act adopts the punitive damages standard set forth in Title VII. 42 U.S.C. § 1981a(a)(2) (2006). The author served as lead counsel in the *Heartway* case (and the *Stocks, Inc.* case, *infra* notes 206–07 and accompanying text) on behalf of the EEOC. The views expressed in this Article are those of the author and do not represent the views of the U.S. Equal Employment Opportunity Commission or of the United States.

204. *Heartway*, 466 F.3d at 1159–60, 1169.

205. *Id.* at 1168–71.

206. *EEOC v. Stocks, Inc.*, 228 F. App'x 429, 432–33 (5th Cir. 2007).

207. *Id.* at 431–32. Interestingly, unlike the courts in *Siouxland* and *Heartway*, the Fifth Circuit refused to order a trial solely on the issue of punitive damages. *Id.* at 432–33. Instead, the court left to the plaintiff "the choice of whether it wants a new trial on all issues, or wishes instead to retain its judgment [issued by the first jury]." *Id.* at 433.

208. *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 905 (8th Cir. 2006).

209. *Id.* at 899.

concerns that the company maintained, and it therefore did not act maliciously.²¹⁰ Because the employer reasonably believed that it was “caught” between OSHA safety regulations and the Americans with Disabilities Act, the company “made a culpable, but not *malicious or reckless*, decision based upon safety concerns.”²¹¹ The court thus vacated the punitive damages award.²¹²

As this sampling of cases demonstrates, there is a significant amount of confusion over when punitive damages are appropriate in employment discrimination matters. This confusion seems largely caused by the ambiguous standard of “malice or . . . reckless indifference” set forth in the statute,²¹³ as well as the lack of clear guidance on how to analyze these cases more generally. It is almost impossible to know how widespread this problem is, as many litigants may even choose not to appeal an adverse determination on exemplary relief, particularly where they have prevailed in other aspects of the case.²¹⁴ Nonetheless, these cases sufficiently demonstrate the extreme difficulty that the lower courts face when applying the Title VII punitive damages standard. Though *Kolstad* was helpful in that it provided a basic framework from which the courts could consider whether to award punitive relief, the decision failed to go far enough in defining when exemplary damages are appropriate. The consequence of the Supreme Court’s failure in *Kolstad* is the current confusion in the lower courts, as clearly seen in the cases discussed above.

IV. A NEW MODEL

The Supreme Court has provided little guidance on interpreting the statutory standard for exemplary relief in Title VII cases. Now that *Kolstad* is over a decade old, it is time to reassess the guidance we have been given and identify those remaining areas of the law that still require clarity. A new model for awarding punitive relief in employment discrimination cases is needed to simplify this area of the law and to provide a blueprint for the litigants and courts when assessing whether exemplary relief is appropriate. The confusion that currently exists in the law has resulted in conflicting opinions in the federal courts and significant inefficiencies for the judicial system. This Article seeks to put an end to this confusion by providing an

210. *Id.* at 903–04.

211. *Id.* at 903 (emphasis added).

212. *Id.* at 905.

213. 42 U.S.C. § 1981a(b)(1) (2006). *See generally* Seiner, *supra* note 4, at 767–72 (discussing application of punitive damages standard to workplace cases by federal courts).

214. On the other hand, the plaintiffs in *Siouxland*, *Heartway*, and *Stocks, Inc.* all prevailed to some degree in their respective cases at the district-court level but still chose to appeal the adverse determination on punitive damages. *See generally* EEOC v. Siouxland Oral Maxillofacial Surgery Assocs., 578 F.3d 921 (8th Cir. 2009); EEOC v. Stocks, Inc., 228 F. App’x 429 (5th Cir. 2007); EEOC v. Heartway Corp., 466 F.3d 1156 (10th Cir. 2006).

analytical framework for evaluating whether exemplary relief is appropriate for a given workplace claim.²¹⁵ In developing this analytical model, we must first briefly reassess what we have learned from *Kolstad* and the subsequent Supreme Court decisions on punitive relief. Though these cases lack clarity for employment discrimination litigants, the decisions do provide a baseline from which we can begin analyzing Title VII claims.

Initially, from *Kolstad*, we learned that when awarding punitive relief we must look to agency principles to impute the unlawful conduct of a supervisor or manager to the employer.²¹⁶ And, as outlined above, *Exxon* makes clear that the courts need not reach the due process issues raised in *Gore* and *State Farm* when addressing employment discrimination claims brought under Title VII.²¹⁷ Finally, after *Philip Morris*, we know that it may be difficult for victims of employment discrimination to use the discriminatory experiences of their coworkers to further punish the employer, though these experiences can still be used to show the reprehensible nature of the employer's conduct.²¹⁸

With these principles from *Kolstad*, *Exxon*, and *Philip Morris* in mind, then, this Article proposes a five-part analytical framework for analyzing whether punitive damages are appropriate for a Title VII claim. Navigating these Supreme Court decisions and keeping in mind the goals of exemplary relief, the proposed framework will serve as a blueprint for litigants and courts to evaluate punitive damages in employment discrimination cases. And, perhaps most important, this model will help resolve the question of what evidence is necessary to establish that an employer has acted with malice or reckless indifference—a standard that has confused and plagued the lower courts for years.²¹⁹ It is worth noting that this framework focuses

215. I have previously argued for replacing the punitive damages scheme of Title VII with a more streamlined liquidated damages approach, similar to that used in age discrimination cases. See generally Seiner, *supra* note 4. This Article takes a different approach by addressing the following question: If exemplary relief continues to be part of the Title VII analysis, what is the best way to analyze these claims?

216. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). In this regard, the supervisor must have acted within the scope of the supervisor's employment and with the knowledge that the acts violated federal law (or with reckless disregard of the law). *Id.*

217. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The *Exxon* Court specifically acknowledged that where federal common law addresses punitive relief, due process concerns are not implicated, *id.*, and Title VII itself provides a reasonable upper limit for potential punitive relief, 42 U.S.C. § 1981a(b)(3).

218. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). As noted earlier, however, there is still some question as to the extent to which the holding of *Philip Morris* will ultimately apply to Title VII claims. See *supra* Part III.C.

219. See *supra* Part III.D (outlining the confusion in the courts over awarding punitive relief to employment discrimination claimants). Some courts have articulated tests for analyzing punitive damages under *Kolstad*. See, e.g., *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1208–09 (10th Cir. 2002) (setting forth test); *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 857–58 (7th Cir. 2001) (same).

exclusively on punitive damages in Title VII cases and does not explore the question of exemplary relief under other civil rights statutes, such as 42 U.S.C. § 1981.²²⁰ Where the proposed model mentions employment discrimination or workplace plaintiffs, then, it is specifically referencing those individuals bringing claims pursuant to Title VII.

Thus, the following five elements should be evaluated at the close of trial to determine whether a punitive damages instruction should be given to the jury in a case of intentional discrimination brought under Title VII.

A. MANAGEMENT-LEVEL EMPLOYEE

When evaluating whether there is sufficient evidence to award punitive damages in an employment discrimination case, the first inquiry is whether a supervisor or manager is responsible for the unlawful conduct. If a supervisor or manager is involved, the inquiry is satisfied and we can move on to the other aspects of the analytical framework. If a supervisor or manager is not involved in the conduct, the inquiry is over, and punitive damages are not warranted in the case.²²¹ Though the question seems relatively straightforward, determining which employees have sufficient supervisory authority to impute liability to the employer is not always easy.

As we learned from *Kolstad*, we must rely on the principles of agency when attempting to impute malicious or reckless conduct to the employer.²²² And *Kolstad* makes clear that liability can be imputed where the employer “authorizes or ratifies the agent’s tortious act,”²²³ or where the individual perpetrating the discrimination is a manager “acting in the scope of employment.”²²⁴ To determine whether an employee is a supervisor, the courts should examine the authority that the individual is given and “the amount of discretion that the employee has in what is done and how it is accomplished.”²²⁵ Midlevel managers would satisfy the Court’s standard (as adopted from the Restatement), as the individual “must be ‘important,’ but perhaps need not be the employer’s ‘top management, officers, or directors,’ to be acting ‘in a managerial capacity.’”²²⁶ Knowing that midlevel managers or supervisors are sufficient to impute liability to the employer for punitive damages is helpful, but it still leaves a significant amount of

220. See *infra* Part V (discussing limitations of the model proposed in this Article).

221. As discussed below, there may be an exception to this rule for instances where the employer knew or should have known of the conduct of a nonsupervisor but failed to act. This possible exception would apply largely to instances of coworker harassment.

222. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 539–46 (1999).

223. *Id.* at 543 (citing RESTATEMENT (SECOND) OF AGENCY § 217C (1957)).

224. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 217C) (internal quotation marks omitted).

225. *Id.* (quoting SCHLEUTER & REDDEN, *supra* note 43, § 4.4(B)(2)(a), at 181) (internal quotation marks omitted).

226. *Id.* (quoting SCHLEUTER & REDDEN, *supra* note 43, § 4.4(B)(2)(a), at 181).

ambiguity as to which employees satisfy this standard. Even *Kolstad* acknowledges that “no good definition of what constitutes . . . ‘managerial capacity’ has been found.”²²⁷

Unfortunately, the Supreme Court has provided no additional guidance on who is a supervisor for purposes of imputing punitive damages liability to the employer in a Title VII case. In the sexual-harassment context, the Court has advised that a supervisor is someone with the authority to take a tangible employment action, which includes hiring, firing, not promoting, or reassigning an employee with significantly different job duties.²²⁸ In this context, a supervisor is someone “with immediate (or successively higher) authority over the [plaintiff].”²²⁹ For additional guidance, we must look to the law of the individual circuits where the suit is filed to determine if the employee perpetrating the unlawful conduct is a management employee. And, not surprisingly, the lower courts have taken varying approaches on this issue.²³⁰ Thus, for example, some courts hold that the ability to merely *recommend* a tangible employment action is sufficient for a worker to have managerial status.²³¹

At a minimum, however, if the employee has the requisite authority to take a tangible employment action, that employee will almost certainly be

227. *Id.* (quoting 2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 24.05, at 14 (1998)) (internal quotation marks omitted).

228. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (“A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (“[T]here is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown.”).

229. *Ellerth*, 524 U.S. at 765.

230. *See generally* Stephanie Ann Henning Blackman, Note, *The Faragher and Ellerth Problem: Lower Courts’ Confusion Regarding the Definition of “Supervisor,”* 54 VAND. L. REV. 123, 163 (2001) (“Because the Supreme Court did not intend to overrule the traditional ‘hiring, firing, or conditions of employment’ definition of supervisor, most courts have correctly continued to apply this definition. Other courts have utilized the expansive language of *Faragher* and *Ellerth*.” (footnote omitted)).

231. *See id.* (discussing supervisor status); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999) (addressing whether an individual was a supervisor under the ADA for purposes of exemplary relief). *But see* *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998) (noting that supervisory employees have authority to “hire, fire, demote, promote, transfer, or discipline an employee” and that without “an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer”); *cf.* *West v. Tyson Foods, Inc.*, 374 F. App’x 624, 639 (6th Cir. 2010) (“Given that [the specified individual] was listed as a proper contact under [defendant’s] policy, the district court cannot be said to have committed plain error in concluding that there was sufficient evidence for the jury to find that [the individual] was a managerial employee for purposes of awarding punitive damages.” (footnote omitted)).

considered a supervisor for purposes of Title VII.²³² This general guideline will help litigants determine whether the bad actor involved is a managerial agent of the company, though the particular facts and circumstances of each case will make it difficult to anticipate every situation that may arise. In sum, if the individual in question can hire, fire, promote, or transfer, then that employee will likely fall within the parameters of possessing managerial authority.²³³ If not, then there is a strong possibility that the individual is not a manager, though additional inquiry into the particular law of the jurisdiction may yield a more definitive answer.²³⁴

One special circumstance to consider is the potential for punitive damages where *coworkers* are responsible for the illegal conduct—a situation likely to arise in the harassment context. The Supreme Court has made clear that an employer may be held liable for discrimination under Title VII where that employer knew or should have known that coworker harassment was present in the workplace but failed to take appropriate remedial action.²³⁵ In this context, however, liability for punitive damages is less clear, as the individual perpetrating the unlawful conduct is a coworker (rather than a managerial employee, which *Kolstad* seems to require). Nonetheless, *Kolstad* does acknowledge that liability for punitive damages may be imputed where the employer “authorizes or ratifies the agent’s tortious act.”²³⁶ It thus seems a fair inference that if a manager ratifies the harassing (or otherwise unlawful) conduct of the victim’s coworker, the first prong of the analytical framework will be satisfied, as a supervisor is ultimately endorsing the discrimination.²³⁷ While there can be little doubt that something beyond mere negligence will be required to hold the employer liable for punitive

232. *Kolstad*, 527 U.S. at 542–43; *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 790. The EEOC has also defined who is a manager in the sexual-harassment context, noting that a supervisor is someone who “has authority to undertake or recommend tangible employment decisions affecting the employee” or someone who “has authority to direct the employee’s daily work activities.” EEOC, EEOC ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, No. 915.002 (June 18, 1999), available at <http://archive.eeoc.gov/policy/docs/harassment.html>.

233. *Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 790. See generally Blackman, *supra* note 230, at 145–46 (“Even though the [Supreme] Court did not expressly adopt the ‘hiring, firing, or conditions of employment’ definition, it seemingly advocated this type of inquiry when determining supervisory status.”).

234. See generally Blackman, *supra* note 230 (looking at various federal court interpretations of who constitutes a *supervisor* in employment discrimination cases).

235. See *Ellerth*, 524 U.S. at 759 (“An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.”).

236. *Kolstad*, 527 U.S. at 543 (citing RESTATEMENT (SECOND) OF AGENCY § 217C (1957)).

237. See David D. Powell, Jr. & Catherine C. Crane, *Complying with the Mandate of Kolstad: Are Your Good Faith Efforts Enough?*, 36 TULSA L.J. 591, 593 (2001) (discussing *Baty v. Willamette Indus.*, 172 F.3d 1232 (10th Cir. 1999), and stating that the Tenth Circuit held that “the plaintiff was entitled to punitive damages upon a showing that the employer failed to make good faith efforts to investigate and respond to her complaints, and that high-level management was aware of and implicitly condoned the offending conduct [of coworkers]”).

relief in the coworker discrimination context, the contours of this issue are still developing in the lower courts.

In summary, to satisfy the first prong of the proposed framework, a supervisor with authority to effectuate a tangible employment action must be involved in the unlawful conduct. If a supervisor is involved but is merely endorsing the discriminatory acts of a coworker or if the supervisor involved has only limited authority to act, the specific facts of the case and law of the jurisdiction must be looked at more closely.

B. MANAGER HAD KNOWLEDGE OF TITLE VII

“[A]n employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages” under Title VII.²³⁸ To satisfy the second prong of the analytical framework, the plaintiff is required to produce sufficient evidence to establish that the employer had knowledge that its actions were in violation of Title VII.²³⁹ This inquiry can be a bit tricky, as uncovering an employer’s knowledge of federal law is not always an easy task.

Unfortunately, there is no exhaustive list of ways to establish an employer’s knowledge of the statute. One common way of establishing a supervisor’s knowledge of Title VII, however, is through testimony at trial or during a deposition.²⁴⁰ Indeed, in an effort to avoid the underlying liability for allegations pertaining to discrimination, company officials may be particularly willing to acknowledge that they are well aware of federal employment discrimination law and indicate that their conduct was entirely consistent with these laws.²⁴¹ Simply asking whether the supervisor in

238. *Kolstad*, 527 U.S. at 536.

239. See, e.g., *Smith v. Xerox Corp.*, 602 F.3d 320, 335 (5th Cir. 2010) (“[A]n employer that is unaware of the relevant federal prohibition or that acts with a justifiable belief that its discrimination is lawful will not be liable for punitive damages.”); *West v. Tyson Foods, Inc.*, 374 F. App’x 624, 638 (6th Cir. 2010) (“In general, courts have found this element met where the plaintiff shows the supervisors involved in the decision at issue had anti-discrimination training or even very general knowledge about anti-discrimination laws or an employer’s anti-discrimination policies.” (quoting *Sackett v. ITC/Deltacom, Inc.*, 374 F. Supp. 2d 602, 612 (E.D. Tenn. 2005) (internal quotation marks omitted))); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1246 (10th Cir. 1999) (discussing whether store manager had sufficient knowledge of the ADA for purposes of awarding exemplary relief); *Bruso v. United Airlines Inc.*, 239 F.3d 848, 857 (7th Cir. 2001) (“To be entitled to punitive damages, a plaintiff must first demonstrate that the employer acted with the requisite mental state.”).

240. See *EEOC v. Siouxlend Oral Maxillofacial Surgery Assocs.*, 578 F.3d 921, 925 (8th Cir. 2009) (holding that the evidence “was sufficient to submit the question of punitive damages to the jury” where a supervisor involved in the unlawful conduct “testified that she knew that discrimination on the basis of pregnancy was illegal”).

241. See *EEOC v. Stocks, Inc.*, 228 F. App’x 429, 431–32 (5th Cir. 2007) (“The owner . . . testified that he did not discipline the plaintiff after her initial complaints, because she would have gone ‘to the EEOC.’ In several of our sister circuits, evidence that the employer has knowledge of the anti-discrimination laws alone is sufficient to demonstrate reckless indifference and allow punitive damages to be submitted to the jury.”).

question has knowledge of Title VII is likely the easiest way for a plaintiff to establish an employer's familiarity with employment discrimination law.

Similarly, a plaintiff can establish the requisite mental state by showing that the employer has conducted training on employment discrimination law that the supervisor(s) in question attended.²⁴² Or the victim can show that the company maintained an explicit policy prohibiting discrimination covered by Title VII of which the supervisor was aware.²⁴³ Finally, another common way of showing the requisite mental state is through the employer's deception. If company workers "lied, either to the plaintiff or to the jury, in order to cover up their discriminatory actions," this evidence would go directly to the employer's knowledge that its conduct was unlawful.²⁴⁴ And in some respects, the sheer fact that Title VII has been in place for nearly half a century will make it difficult for managers to deny their familiarity with its operative provisions.²⁴⁵ Given the history and widespread nature of federal employment discrimination law, then, some courts might even be willing to presume that managers (particularly at large corporations) are aware of Title VII's provisions,²⁴⁶ though plaintiffs should not rely solely on this presumption.

The knowledge requirement is likely the most difficult element of the analytical framework for the plaintiff to establish. Indeed, there are a number of readily available explanations for an employer's discriminatory conduct that often have nothing to do with a desire to intentionally violate

242. See, e.g., *EEOC v. Heartway Corp.*, 466 F.3d 1156, 1169 (10th Cir. 2006) (manager involved in unlawful conduct concedes at trial that on the basis of training received he was aware "that it was against the law to fire someone because they had a disability"); *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001) (discussing whether antidiscrimination training is sufficient to impute knowledge of federal law); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 443 (4th Cir. 2000) (same); see also *Monteagudo v. Asociación de Empleados del Estado Libre Asociado de P.R.*, 554 F.3d 164, 176–77 (1st Cir. 2009) (noting importance of training for good-faith defense).

243. See, e.g., *West*, 374 F. App'x at 638 (discussing managers' knowledge of company's antiharassment policy); *Bruso*, 239 F.3d at 857–58 (noting importance of knowledge of company antidiscrimination policy for purposes of awarding punitive damages); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) (noting importance of manager's knowledge of sexual-harassment policy for purposes of exemplary relief).

244. *Bruso*, 239 F.3d at 858 (citing *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000)).

245. See generally *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 38 (1st Cir. 2001) ("The extent of federal statutory and constitutional law preventing discrimination on the basis of ethnicity or race suggests that defendants had to know that such discrimination was illegal . . ."); *Zimmermann*, 251 F.3d at 385 (citing *DiMarco-Zappa*, 238 F.3d at 38, and *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000), and noting that "some courts have ruled" that "all managers are now chargeable with knowledge of Title VII's clear requirements"); *Molnar*, 229 F.3d at 604 (upholding punitive damages award and emphasizing that "[t]he events here took place in 1994, long after the law of sexual harassment had become well established by the Supreme Court").

246. See *supra* note 245.

federal law.²⁴⁷ Some of the most common explanations for why an employer might run afoul of Title VII—without acting with malice or reckless disregard—were set forth by the Supreme Court in *Kolstad*, and include cases where

the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability.²⁴⁸

Thus, an employer does not act with the requisite mental state to warrant punitive damages where that employer is not aware of Title VII, where the employer believes its discriminatory conduct is lawful, where the basis for liability is new or undeveloped, or where the employer reasonably believes its conduct falls within a statutory exception.²⁴⁹ Certainly, we must look to the facts and circumstances of the particular case to determine if one of these explanations adequately applies, keeping in mind that it is the plaintiff's ultimate burden in the matter to establish liability for punitive relief.²⁵⁰

Nonetheless, simply asking during a deposition or at trial whether those involved in the unlawful conduct were aware of, or had training on, Title VII may often yield the evidence necessary to establish the second prong of the proposed analytical framework. And, as discussed above, there are a variety of other ways to go about establishing an employer's knowledge of Title VII's provisions. Finally, it is worth noting that there are likely additional ways—beyond simply demonstrating an employer's familiarity with the statute—to establish that a company discriminated “in the face of a perceived risk that its actions will violate federal law.”²⁵¹ Establishing knowledge of Title VII, however, is the most common way of demonstrating the requisite mental state of the employer.²⁵²

247. See, e.g., Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 438 n.90 (2007) (noting circumstances the *Kolstad* Court identified where intentional discrimination would not subject the employer to exemplary damages).

248. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536–37 (1999).

249. *Id.*

250. See *id.* at 546 (“We have concluded that an employer's conduct need not be independently ‘egregious’ to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof.”).

251. *Id.* at 536.

252. The fact-specific nature of exploring the mental state of an employer makes this inquiry particularly difficult to quantify. The analytical model proposed here is thus intended to be simply one way of analyzing punitive damages under the statute, and it should be considered

C. MANAGER ACTING WITHIN SCOPE OF EMPLOYMENT

The third prong of the proposed analytical framework—demonstrating that the manager involved acted within the scope of employment—will typically be the easiest to establish.²⁵³ The Restatement (Second) of Agency permits an award of punitive damages against a principal as a result of the acts of a managerial employee if that employee is “acting in the scope of employment.”²⁵⁴ Under *Kolstad* and the Restatement, this means that the manager’s actions are of “the kind [the employee] is employed to perform,” that the conduct “occurs substantially within the authorized time and space limits,” and that the actions are “actuated, at least in part, by a purpose to serve the employer.”²⁵⁵

As discussed in greater detail below, *Kolstad* suggests that almost all adverse employment acts taken by a supervisor against an employee will fall within the scope of employment, even where those acts are intentional.²⁵⁶ This is true because when an employer violates Title VII, it has taken an action against an employee that affects the “terms, conditions, or privileges of employment” of that individual.²⁵⁷ A manager’s violation of Title VII, then, will typically occur at work, during normal business hours, and with the authority given to that supervisor—thus placing the conduct squarely within the scope of employment.²⁵⁸ Obvious exceptions come to mind—such as where a supervisor harasses an employee after hours and away from the place of business. But even this kind of harassing conduct will typically still involve some type of workplace component. And where there is simply no relationship to the conduct in question and the workplace environment, it is likely that the actions will not fall within the ambit of Title VII at all, let alone entitle the plaintiff to punitive damages.²⁵⁹

a flexible approach. In those circumstances where the facts are unusual or do not fit the typical pattern of an employment discrimination case, the courts and litigants should look beyond the confines of the model set forth here. See *infra* Part V (setting forth the limitations of the model).

253. See, e.g., *Monteagudo v. Asociación de Empleados del Estado Libre Asociado de P.R.*, 554 F.3d 164, 176 (1st Cir. 2009) (noting that plaintiff can impute liability “by showing that the employee who discriminated against her was a managerial agent acting within the scope of his employment” (quoting *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 64 (1st Cir. 2005)) (internal quotation marks omitted)); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 444 (4th Cir. 2000) (noting that *Kolstad* “adopt[ed] [the] Restatement (Second) of Agency’s scope of employment test for intentional torts but modif[ied] it to provide a good-faith exception”); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999) (discussing the scope of the employment test from *Kolstad*).

254. See generally *Kolstad*, 527 U.S. at 542–43 (quoting RESTATEMENT (SECOND) OF AGENCY § 217C (1957)).

255. *Kolstad*, 527 U.S. at 543 (quoting RESTATEMENT (SECOND) OF AGENCY § 228(1)) (internal quotation marks omitted).

256. See *Kolstad*, 527 U.S. at 543–45.

257. 42 U.S.C. § 2000e-2(a) (2006).

258. *Kolstad*, 527 U.S. at 543.

259. See 42 U.S.C. § 2000e-2(a).

Thus, to satisfy the third component of the proposed model, an employee must demonstrate that the offending manager was acting within the scope of employment.²⁶⁰ In the typical Title VII case—where a supervisor has taken an adverse action against a worker that affects the terms, conditions, or privileges of employment—that supervisor will be acting within the scope-of-employment as interpreted through the rules of agency and the *Kolstad* decision.²⁶¹ Nonetheless, litigants should still make certain that the facts do not present an unusual set of circumstances where this component of the proposed model would be called into question.²⁶²

D. GOOD-FAITH EFFORTS

The fourth prong of the proposed analytical model for punitive damages provides an affirmative defense for employers. Under this defense, if the employer can demonstrate that it made good-faith efforts to comply with Title VII, it can completely evade liability for punitive damages under the statute.²⁶³ This defense has its roots in the *Kolstad* decision and the principles of agency.

As noted above, the Restatement requires that a manager be acting within the scope of employment to subject an employer to liability for punitive damages.²⁶⁴ While this rule is straightforward, the *Kolstad* Court expressed concern over applying the “scope-of-employment” concept to workplace punitive damages.²⁶⁵ In this regard, the Court found it problematic that under the rules of agency, “an employee may be said to act within the scope of employment even if the employee engages in acts ‘specifically forbidden’ by the employer and uses ‘forbidden means of accomplishing results.’”²⁶⁶ Thus, the Court was worried that if the rules of agency were strictly applied, they could potentially subject an employer to

260. See generally Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R.-C.L. L. REV. 279, 317–19 (2001) (discussing scope-of-employment concept).

261. See *Kolstad*, 527 U.S. at 543–45.

262. Another scenario that could call the “scope-of-employment” test into question would be where an individual is retaliated against outside of the workplace after complaining of the employer’s discriminatory conduct. See generally *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (“Title VII’s substantive provision and its antiretaliation provision are not coterminous. The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm.”). Given the somewhat lower threshold for what constitutes a retaliatory act, as opposed to a substantive violation under the statute, Title VII retaliation claims should be examined particularly closely to make certain that the manager’s conduct occurs within the scope of employment. See *id.* at 67–68.

263. *Kolstad*, 527 U.S. at 545–46. See generally Seiner, *supra* note 4, at 783–86 (discussing good-faith defense).

264. See generally *id.* at 542–43 (discussing RESTATEMENT (SECOND) OF AGENCY § 217C (1957)).

265. *Id.* at 544–45.

266. *Id.* at 544 (quoting RESTATEMENT (SECOND) OF AGENCY § 230 cmt. B).

liability for punitive damages for the unlawful conduct of a managerial employee even where the company “makes every effort to comply with Title VII.”²⁶⁷

As a result of these concerns, the *Kolstad* Court modified the scope-of-employment concept to include a “good-faith-efforts” exception for the employer.²⁶⁸ Under this defense, for purposes of punitive damages, “an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’”²⁶⁹ By creating this defense, the Court hoped to avoid the possible “perverse incentives” of the scope-of-employment concept, as well as to “promote prevention as well as remediation” by encouraging employers to comply with the terms of the statute.²⁷⁰ In the Court’s view, such a defense would likely promote the use of antidiscrimination polices and training on employment discrimination laws by employers.²⁷¹

After *Kolstad*, then, we look to a modified “scope-of-employment” test when considering whether punitive damages are applicable in a case.²⁷² Thus, in addition to considering whether the manager involved in the unlawful conduct was acting within the scope of employment, we should also examine whether the employer made good-faith efforts to comply with the statute.²⁷³ This raises the obvious question of what facts are necessary to establish whether the employer is acting in good faith. The *Kolstad* decision suggests that implementing an antidiscrimination policy and conducting training on employment discrimination laws for workers could be two ways of demonstrating an employer’s good faith.²⁷⁴ And, indeed, having an effective policy in place and training workers on the provisions of Title VII are often cited by the lower courts as important considerations when evaluating an employer’s purported good faith.²⁷⁵

267. *Id.* The Court further noted that if the scope-of-employment concept were applied to Title VII it “would reduce the incentive for employers to implement antidiscrimination programs.” *Id.* Indeed, “such a rule would likely exacerbate concerns among employers that § 1981a’s ‘malice’ and ‘reckless indifference’ standard penalizes those employers who educate themselves and their employees on Title VII’s prohibitions.” *Id.*

268. *Id.* at 545–46.

269. *Id.* at 545 (quoting *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

270. *Id.*

271. *Id.*

272. *Id.* at 542–46.

273. *Id.*

274. *Id.*

275. *See, e.g.,* *Monteagudo v. Asociación de Empleados del Estado Libre Asociado de P.R.*, 554 F.3d 164, 176–77 (1st Cir. 2009) (discussing good-faith standard); *McInnis v. Fairfield Cmty., Inc.*, 458 F.3d 1129, 1139 (10th Cir. 2006) (same); *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 385–86 (2d Cir. 2001) (same); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000) (same).

Indeed, surveying the decisions of the lower courts, it becomes much clearer what type of conduct an employer must engage in to avoid punitive damages liability through its good-faith efforts.²⁷⁶ The first—and most important—hurdle in this regard is that the employer *must* have some type of antidiscrimination policy in place.²⁷⁷ Without an antidiscrimination policy, it will be almost impossible for an employer to avail itself of this defense.²⁷⁸ Having a clear, definite, and extensive policy will also prove helpful to the employer.²⁷⁹ Additionally, a company must do more than simply adopt an antidiscrimination policy—it must demonstrate that the policy is effectively maintained and enforced.²⁸⁰ In this regard, the employer should strive to abide by its policies and try not to apply them inconsistently.²⁸¹ A company should also educate and train its employees both on its policies and how to prevent employment discrimination more generally.²⁸² Finally, an employer must respond to employee complaints that it receives through the mechanisms established in its policies.²⁸³ Whether an employer engages in good-faith efforts to comply with Title VII is certainly a fact-intensive inquiry. However, by adopting an extensive antidiscrimination policy that is both effectively and consistently maintained and enforced, an

276. One court lamented that “*Kolstad* provides us no definitive standard for determining what constitutes good-faith compliance with the antidiscrimination requirements.” *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999).

277. See *West v. Tyson Foods, Inc.*, 374 F. App’x 624, 639 (6th Cir. 2010) (noting the importance of a company antidiscrimination policy for purposes of avoiding imposition of punitive damages); *Monteagudo*, 554 F.3d at 176–77 (same); *McInnis*, 458 F.3d at 1138 (same); *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 461 (4th Cir. 2002) (same); *Davey v. Lockheed Martin*, 301 F.3d 1204, 1209 (10th Cir. 2002) (same); *Lowery*, 206 F.3d at 446 (same).

278. See *supra* note 277.

279. See *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999) (finding that an employer policy of simply encouraging employees to report grievances to management was insufficient to establish good-faith defense).

280. See *West*, 374 F. App’x at 639 (“An employer will not be shielded simply by having an antidiscrimination policy. It must demonstrate that it engaged in good-faith efforts to implement that policy.”); *Monteagudo*, 554 F.3d at 176–77 (noting the importance of following company policy); *McInnis*, 458 F.3d at 1138 (noting the importance of enforcing company policy); *Zimmermann*, 251 F.3d at 385 (same); *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) (same).

281. See *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 533 (6th Cir. 2005) (stating that the plaintiff “presented evidence of a number of inconsistent practices . . . which calls into question [defendant’s] sincerity to abide by its own written [antidiscrimination] policies”).

282. See *Monteagudo*, 554 F.3d at 176–77 (noting the importance of education for good-faith defense); *McInnis*, 458 F.3d at 1138 (same); *Davey*, 301 F.3d at 1209 (same); *Anderson*, 281 F.3d at 461 (noting the importance of training for good-faith defense).

283. See *West*, 374 F. App’x at 639 (discussing the sufficiency of company response to discrimination); *Golson v. Green Tree Fin. Servicing Corp.*, 26 F. App’x 209, 215 (4th Cir. 2002) (same); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 663–64 (7th Cir. 2001) (same).

employer will go a long way toward satisfying this good-faith inquiry, as well as the fourth prong of the proposed analytical framework.²⁸⁴

One final consideration for the good-faith-efforts defense is where the burden of proof lies with this element. There is no definitive rule for which party bears the burden of proof with this test,²⁸⁵ though *Kolstad* seems to treat the good-faith-efforts inquiry as an affirmative defense for the employer.²⁸⁶ Additionally, the lower courts have generally placed the burden of proof for the good-faith-compliance question on the company.²⁸⁷ Thus, while there is not a definitive answer to where the burden of proof lies for this inquiry, both the reasoning of the Supreme Court and the trend in the lower courts strongly suggest that this is an affirmative defense for the employer to establish.²⁸⁸ As such, the analytical framework for punitive damages proposed here will similarly place the burden of proof on the employer for this good-faith test.

E. JUDGMENT AS A MATTER OF LAW

The final element of the proposed analytical framework for analyzing whether a punitive damages jury instruction is appropriate in a Title VII employment discrimination case is *optional* and proposes giving the jury this instruction even in those circumstances where the court is otherwise inclined to *deny* the plaintiff's request for exemplary relief. In these situations, the court should strongly consider allowing the jury to decide the issue but entertain a renewed motion for a judgment as a matter of law ("JMOL") from the defendant following the trial.²⁸⁹ Thus, if the court permits the jury to resolve the underlying question of whether the employer intentionally discriminated against the employee, at a minimum, the court should further give the jury the question of what amount of punitive relief is appropriate in the case (if any). Whether the court ultimately allows the

284. See Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1641-43 (2007) (discussing employer policies and training efforts). See generally Powell & Crane, *supra* note 237 (providing an overview of the good-faith-efforts defense and various circumstances where courts will accept or reject the defense).

285. See, e.g., *Davey*, 301 F.3d at 1209 (noting that "[i]t is unclear whether the good-faith-compliance standard set out in *Kolstad* represents an affirmative defense on which the defendant bears the burden of proof or whether the plaintiff must disprove the defendant's good faith compliance with Title VII" (quoting *Cadena*, 224 F.3d at 1209 n.4) (alteration in original) (internal quotation marks omitted)).

286. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999).

287. See *Davey*, 301 F.3d at 1209 & n.4 (citing *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001); *Romano v. U-Haul Int'l*, 233 F.3d 655, 670 (1st Cir. 2000); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999)) (not resolving the question of which party has the burden of proof for the good-faith test, but noting that a number of circuits "have determined the defense is an affirmative one").

288. See *Kolstad*, 527 U.S. at 543-46; see also *supra* note 287.

289. FED. R. CIV. P. 50(a)-(b).

jury's punitive damages verdict to stand, however, is ultimately within its own discretion.²⁹⁰

Jury trials are expensive and time-consuming endeavors.²⁹¹ If a district court declines to give a punitive damages instruction to a jury and is subsequently overturned, another jury must be empaneled to resolve this question.²⁹² Indeed, in at least one jurisdiction, the entire case may have to be retried if the appellate court overturns the lower court on the question of exemplary relief.²⁹³ And, as demonstrated earlier, it is not an uncommon result for a district court to be overturned on its decision to restrict punitive damages in an employment discrimination case.²⁹⁴ To save significant judicial resources in these matters, then, a district court—when inclined to deny punitive relief—should still ask the jury whether punitive damages are appropriate and in what amount they should be awarded. The court may then strike the award following the defendant's renewed motion for JMOL. If the district court is subsequently overturned on the punitive damages question, the jury's verdict could then be reinstated, completely obviating the need to retry the matter.

There may be some concern that providing the jury with this somewhat advisory determination of exemplary relief may distort the verdict. In this regard, perhaps a jury would have awarded a victim greater compensatory

290. *Id.*

291. See, e.g., Lucille M. Ponte, *Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority*, 63 *FORDHAM L. REV.* 1069, 1078 n.68 (1995) ("A jury trial, even one of summary nature, however, requires at minimum the time-consuming process of assembling a panel and (one would hope) thorough preparation for argument by counsel, no matter how brief the actual proceeding." (quoting *In re NLO Inc.*, 5 F.3d 154, 158 (6th Cir. 1993))).

292. See, e.g., *EEOC v. Heartway Corp.*, 466 F.3d 1156, 1171 (10th Cir. 2006) (noting that reversing the district court's flawed decision not to give a punitive damages instruction to the jury "requires that we remand for a new trial, solely on the issue of punitive damages"); see also *EEOC v. Siouxland Oral Maxillofacial Surgery Assocs.*, 578 F.3d 921, 927 (8th Cir. 2009) (holding that the "district court erred in granting [defendant] judgment as a matter of law on [certain] punitive-damages claims" and remanding "for a new trial solely on the issue of punitive damages").

293. See, e.g., *EEOC v. Stocks, Inc.*, 228 F. App'x 429, 433 (5th Cir. 2007) (holding that district court erred in failing to give punitive damages instruction and stating that "[a] future jury's decision to award punitive damages will be tied to the same evidence of intent as will be the liability decision, and the factual dispute surrounding the events leading to [the victim's] suspension will be central to the decision that [the defendant] retaliated in reckless indifference to her rights. . . . By our remand, we leave to the [plaintiff] the choice of whether it wants a new trial on all issues, or wishes instead to retain its judgment [without punitive damages]").

294. See *supra* Part III.D (discussing the *Siouxland*, *Heartway*, and *Stocks, Inc.* employment discrimination cases, where the federal appellate courts overturned the decisions of the district courts not to permit the respective juries to consider punitive relief); cf. *Alvarado v. Fed. Express Corp.*, 384 F. App'x 585, 590 (9th Cir. 2010) ("Because we have affirmed the jury's verdict and award of compensatory damages, we remand for a new trial solely on the state and federal law claims for punitive liability and damages.").

damages or backpay if it believed that punitive damages were unavailable in the case. While the proposed approach may present this practical difficulty, it should be noted that juries should not be adjusting their other award determinations based on the availability of punitive relief. Furthermore, the significant efficiencies created by allowing the jury to reach the punitive damages issue should outweigh any concerns that juries might inappropriately adjust their overall damages determination based on the instruction.

Thus, the final component of the proposed analytical framework is optional and is targeted primarily at enhancing efficiencies in the judicial system. Where a court is inclined not to allow punitive damages in a case that will otherwise be decided by a jury, the court should still allow the jury to consider the question of exemplary relief on an advisory basis.

F. OTHER CONSIDERATIONS

In addition to the proposed five-part analytical framework for analyzing punitive damages claims set forth above, there are some additional considerations that the litigants and courts should evaluate when addressing these issues. These concerns arise primarily from the *Philip Morris* and *Exxon* decisions on punitive damages discussed above.²⁹⁵ Though not arising in the employment discrimination context, these cases are instructive and the courts should still consider the possible implications of the decisions. As already noted, the primary holding from *Philip Morris* is that a jury may consider harm incurred by strangers to the litigation for purposes of considering reprehensibility—but not punishment—when awarding punitive damages.²⁹⁶

The main lesson from *Philip Morris* for employment discrimination litigants is that Title VII plaintiffs may be unable to use the discriminatory experiences of their coworkers to further punish the employer.²⁹⁷ Instead, these individuals would be left to couch the experiences of their coworkers in terms of the reprehensible nature of the employer's conduct.²⁹⁸ To the extent *Philip Morris* is applicable to a federal law such as Title VII, then, the federal courts should strongly consider restricting the use of evidence of third-party harm for the purpose of attempting to punish the employer through punitive relief.²⁹⁹ Thus, after *Philip Morris*, a court should carefully evaluate how this type of evidence is presented to a jury, if at all.

Similarly, in *Exxon*, the Supreme Court held that where federal common law is in place to address punitive relief, due process concerns are

295. See *supra* Parts II–III (discussing recent Supreme Court decisions on exemplary relief).

296. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

297. *Id.* at 354.

298. *Id.*

299. *Id.*

not implicated.³⁰⁰ After *Exxon*, then, it is clear that the courts need not reach the due process issues raised in *Gore* and *State Farm* when addressing employment discrimination claims brought under Title VII.³⁰¹ When evaluating a jury's award of punitive relief after *Exxon*, the court and litigants should therefore not be concerned with the "guideposts" set forth in *Gore* or (more specifically) with the ratio of punitive relief to actual harm in a Title VII case. Any award of exemplary relief that falls within the permitted statutory range—up to \$300,000 for the largest employers—should satisfy the constitutional standards.³⁰² The Court's decision in *Exxon* thus makes it much more likely that a jury's award of punitive damages in a Title VII case will stand and makes a court's job much easier in reviewing the award.

Certainly, a punitive damages award may still be reviewed for excessiveness, and there may well be circumstances where a reduction of the award is still appropriate. The most obvious scenario where an award should be reduced, for example, would be where the amount is in excess of the statutory limits.³⁰³ Nonetheless, after *Exxon*, a court's role in reviewing the *amount* of the award should be fairly limited in an employment discrimination case.

In sum, despite the fact that the recent *Philip Morris* and *Exxon* Supreme Court decisions did not involve Title VII, the cases certainly have strong implications for employment discrimination claimants who seek punitive relief. The courts and parties should thus strongly consider whether these cases impact the facts or claims of any workplace litigation.

G. SUMMARY OF PROPOSED FRAMEWORK

The five-part analytical framework for evaluating punitive damages in employment discrimination cases attempts to provide clarity to an otherwise confused area of the law. The model navigates the *Kolstad*, *Philip Morris*, and *Exxon* Supreme Court decisions to provide a simplified test for courts and litigants to use when analyzing these cases. And, most importantly, this model answers the difficult question left by *Kolstad*—what *with malice or with reckless indifference* means for the typical workplace litigant. In conclusion, when analyzing whether a punitive damages instruction should be given to a jury in an employment discrimination case brought pursuant to Title VII, the courts and litigants should evaluate:

1. Whether a supervisor is responsible for the unlawful conduct;
2. whether the supervisor had knowledge of Title VII;
3. whether the supervisor was acting within the scope of employment;

300. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501–02 (2008).

301. *Id.* As discussed earlier, the federal case law of Title VII, along with the cap for punitive damages in the statute, combine to satisfy any constitutional concerns over punitive relief. *See supra* Part III.C (discussing workplace implications of *Exxon* decision).

302. *See* 42 U.S.C. § 1981a(b)(3) (2006).

303. *Id.*

4. whether the employer was acting in good faith; and
5. whether the court should allow the punitive damages question to go to the jury even where it is inclined to deny punitive relief.

In analyzing these factors, the burden of proof is also critical to consider. The employee must produce sufficient evidence to satisfy the first three elements of the framework by demonstrating that a management-level employee—acting within the scope of employment—was both responsible for the unlawful conduct and aware of the requirements of the statute. The employer may still avoid punitive damages for the unlawful conduct if it can satisfy the fourth element of the test by showing that it made good-faith efforts to comply with Title VII. Finally, if the court is inclined against awarding punitive relief, it should still ask the jury whether punitive damages are appropriate and in what amount they should be awarded. The court may then strike the award following the defendant's renewed motion for JMOL. If the district court is subsequently overturned on the punitive damages question, this jury verdict could be reinstated, avoiding the need to retry any part of the case.

When considering the presentation of evidence on punitive damages to the jury, the court should also keep in mind the possible limitations of *Philip Morris*. Thus, a court should be hesitant to allow the jury to punish an employer for harm caused to strangers to the litigation, though such evidence can be used for purposes of showing reprehensibility. Similarly, after *Exxon*, once the jury awards punitive damages in a Title VII case, the court's role in reviewing the amount of the award should be limited. The court may, however, analyze the award for excessiveness.

By analyzing whether punitive damages are appropriate pursuant to this proposed analytical model, courts and litigants will satisfy the standards set forth in *Kolstad* and the recent Supreme Court decisions on this issue. Though the proposed model is simply one way of examining these cases, it can be used for many Title VII claims.³⁰⁴ And while the courts have struggled with how to comply with *Kolstad*, the proposed model clearly and concisely articulates whether an employment discrimination plaintiff is entitled to exemplary relief.

V. LIMITATIONS OF PROPOSED MODEL

Though the analytical model for examining punitive damages in the workplace will provide simplicity to a currently confused process, the model is not without its limitations. Most notably, the proposed model is intended to apply only to individual cases of disparate treatment discrimination. Though the same basic principles set forth in this Article can also be applied to class action or systemic litigation, such cases must be analyzed much more carefully when determining whether exemplary relief is appropriate. And as

304. See *infra* Part V (discussing limitations of proposed model).

punitive damages are only appropriate in cases where *intentional* discrimination has been established, the model would certainly be inapplicable to disparate impact cases (which involve unintentional discrimination). The model set forth here should also be used only at the close of evidence in a Title VII case, when determining whether a punitive damages instruction should be given to the jury. The model should not be used at earlier stages of the litigation, other than as a guide for the basic principles of punitive damages in the workplace.

As noted throughout this Article, the model is also intended only for cases brought pursuant to Title VII (which prohibits discrimination on the basis of “race, color, religion, sex, or national origin”),³⁰⁵ as well as disability cases brought under the ADA. It is not intended for claims brought under other civil rights statutes, such as 42 U.S.C. § 1981. In particular, it is worth noting that claims brought under § 1981 will deserve special analysis, as this statute does not impose statutory caps on punitive relief like Title VII.³⁰⁶ Thus, while beyond the scope of this Article, the question of the extent to which the *Exxon* decision will apply to § 1981 claims should be addressed.³⁰⁷

Additionally, the model proposed here must be adapted to the principles set forth in the Supreme Court’s decisions in *Faragher v. City of Boca Raton*³⁰⁸ and *Burlington Industries, Inc. v. Ellerth*³⁰⁹ when considering whether punitive damages are appropriate in harassment cases.³¹⁰ Similarly, the Court’s jurisprudence on retaliation claims, as recently discussed in *Burlington Northern & Santa Fe Railway Co. v. White*,³¹¹ must be considered when determining whether punitive relief is appropriate for a case alleging unlawful reprisal. Harassment claims and retaliation cases present special Title VII factual scenarios, then, and the proposed model should only be used with these Supreme Court cases in mind.

As the above limitations make clear, the model proposed here is simply one way of analyzing whether punitive damages are appropriate in cases involving workplace discrimination.³¹² Certainly, there are many other ways of determining whether exemplary relief is appropriate, and the facts of each particular case must be carefully analyzed. Nonetheless, the model set

305. 42 U.S.C. § 2000e-2(a) (2006).

306. 42 U.S.C. § 1981 (2006); *see also* Sperino, *Judicial Preemption of Punitive Damages*, *supra* note 13, at 235 (noting that there are no statutory caps in 42 U.S.C. § 1981 claims).

307. *See supra* Section III.C (discussing application of *Exxon* to Title VII cases).

308. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

309. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

310. *See supra* Part IV.A (discussing whether punitive damages would apply in cases involving coworker harassment).

311. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

312. For example, as Professor Sandra Sperino correctly points out in her excellent response to this Article, employers may also be responsible for punitive damages via direct liability. *See* Sandra F. Sperino, *Direct Liability for Punitive Damages*, 97 IOWA L. REV. BULL. (forthcoming 2012).

forth in this Article provides a simple, straightforward way of analyzing punitive damages in many Title VII employment discrimination cases.

VI. IMPLICATIONS OF PROPOSED FRAMEWORK

The model proposed here for analyzing workplace punitive damages claims has many implications for this area of the law.³¹³ Perhaps the most significant benefit of the proposed model is its simplicity. The framework takes a confused area of the law and provides a straightforward way of resolving the otherwise complex issue of exemplary relief. The courts and litigants should thus easily be able to apply this model to Title VII cases to determine whether punitive relief is appropriate. And the model simplifies and explains how the recent Supreme Court cases on punitive damages should apply in the employment discrimination context. Similarly, the model clearly addresses what evidence is necessary to establish malice or reckless indifference after the Court's decision in *Kolstad*. Thus, a plaintiff successfully navigating the elements of the proposed analytical framework will have established (under the statute and relevant Supreme Court precedent) the requisite mental state of the employer. As demonstrated above, this question has led to conflicting decisions in the federal courts. The model thus makes sense of *Kolstad*, *Philip Morris*, and *Exxon* and explains—in simple terms—how these decisions should be applied to employment discrimination cases arising under Title VII.³¹⁴

By providing a uniform model, the proposed framework should also bring much more certainty to the damages analysis of workplace discrimination claims. Cases analyzing workplace punitive damages have resulted in varying opinions and confused analyses.³¹⁵ By bringing uniformity to this area of the law, the courts and litigants will much more easily be able to evaluate the potential damages in a particular case. And with more certainty in the process comes the increased likelihood that more workplace claims will settle before reaching litigation.³¹⁶ Through simplicity and uniformity, then, the proposed analytical framework set forth in the Article should help the parties to better evaluate workplace punitive damages claims and, thus, better allows the statute to effectively achieve the goals associated with exemplary relief.

313. See generally Seiner, *supra* note 4 (discussing analysis of punitive damages in employment discrimination cases and implications of a proposed model).

314. See generally *supra* Part IV (setting forth parameters of proposed model for analyzing punitive relief in employment discrimination cases).

315. See *supra* Part III.D (discussing difficulty lower courts have encountered when applying *Kolstad* decision).

316. See Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 662 ("The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.").

Some might argue that the proposed model is too rigid and takes necessary discretion away from the courts when analyzing workplace discrimination claims. While there should be concern over adopting an inflexible model, the framework set forth in this Article is not intended to be overly rigid, and the courts have significant leeway in applying the various factors to the specific facts of the case. Additionally, as already noted, this model is simply one way of evaluating whether punitive damages are appropriate in a particular case.³¹⁷ The courts and parties are free to use other methods of evaluating the cases as well, particularly where there is an unusual fact pattern that would call for a more specialized analysis.

It could also be argued that the proposed model is unnecessary as the courts have been resolving workplace claims for over a decade after the *Kolstad* decision. While *Kolstad* certainly helped provide much needed guidance on when punitive relief is appropriate in employment discrimination cases, in many ways the decision generated more questions than answers, resulting in confused lower court decisions. The model proposed here assists the courts in evaluating employment discrimination claims and could help bring some uniformity to this process. Thus, while the courts have used the *Kolstad* decision to analyze workplace claims, the analytical framework proposed here simplifies the analysis. Moreover, the proposed model helps clarify how the more recent Supreme Court decisions in *Philip Morris* and *Exxon* might impact Title VII claims. By explaining how these cases should apply to Title VII claims, the analytical framework could help avoid years of unnecessary litigation on this topic.

In the end, any concerns over the proposed punitive damages model are outweighed by the simplicity and uniformity that the framework brings to Title VII claims. By providing greater efficiency to the judicial process, the analytical framework set forth in this Article should greatly enhance the evaluation of punitive relief in employment discrimination cases.

VII. CONCLUSION

Analyzing a punitive damages claim brought in the workplace context is fraught with problems. In the years following *Kolstad*, there have been divisive and conflicting opinions in the lower courts, as well as a general confusion over the applicability of the remedial provisions of Title VII. By offering an analytical framework for assessing exemplary relief in employment discrimination cases, this Article seeks to end that confusion. The proposed model integrates the critical lessons from *Kolstad* and makes sense of the more recent *Exxon* and *Philip Morris* decisions. By providing much needed clarity and simplicity to this area of the law, this Article attempts to help shape the future of workplace punitive damages.

³¹⁷. See *supra* Part V (discussing limitations of proposed model).